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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, *Appellant,*

VS.

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Appellees.*

DWIGHT GEDULDIG, *Appellant,*

VS.

AUGUSTINA D. ARMENDARIZ, *et al.*, individually and on behalf of all other women similarly situated, *Appellees.*

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Three-Judge Court for the Northern District of California is reported *sub nom.*

Aiello v. Hansen at 359 F.Supp. 792 (N.D.Cal. 1973). The Court's order denying reconsideration is unreported, but is included in the Appendix at pp. A-54-55.

JURISDICTION

Jurisdiction of the District Court was invoked under 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

The judgment of the Three-Judge Court for the Northern District of California was entered on June 15, 1973. The Court's order denying rehearing was filed on August 7, 1973. Appellant's Notice of Appeal was filed on August 13, 1973. Jurisdiction of this Court was invoked pursuant to 28 U.S.C. §§1253 and 2101(b).

THE STATUTES INVOLVED

Section 2626 of the California Unemployment Insurance Code provided at the time judgment was entered herein:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with

pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

Effective January 1, 1974, §2626 has been amended and a new §2626.2 has been added (Stats. 1973, c. 1026):

"Disability" or "disabled" includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

[Section 2626.2] Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

Unemployment Insurance Code §2601 states the legislative objective of California's comprehensive temporary disability insurance program:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

QUESTION PRESENTED

Whether a statute denying temporary disability insurance benefits to an otherwise qualified applicant therefor, on the sole ground that the applicant's illness or injury is related to or caused by pregnancy or childbirth, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, where the statute is part of a comprehensive state disability insurance scheme providing such benefits to individuals disabled for virtually any other reason.

STATEMENT OF THE CASE

I.

HISTORY OF THE CASE

Appellees filed these actions on behalf of themselves and all other women "who, but for the fact that their disability is due to illness or injury caused by or arising in connection with pregnancy, are or would be eligible to receive disability insurance benefits from the

state of California." (Para. V, Consolidated Complaint, Appendix at 4.)[1]

Appellees challenged the constitutionality of §2626 of the California Unemployment Insurance Code insofar as the State's comprehensive disability insurance program singled out and excluded from coverage any illness or injury arising out of or in connection with pregnancy. The statute was alleged to deny women the equal protection of the laws guaranteed by the United States (Amend. XIV) and California (Art. I, Secs. 11 and 21) Constitutions and to discriminate against women in their terms of employment, contrary to Article XX, Section 18 of the California Constitution. Appellees sought a declaration that the challenged provision was unconstitutional and injunctive relief against further enforcement of the disqualifying provision. A Three-Judge Court was therefore convened, pursuant to 28 U.S.C. §§2281 and 2284.

The United Automobile, Agricultural, Implement and Aerospace Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America,

[1]The action on behalf of Carolyn Aiello and others similarly situated was filed in the United States District Court for the Northern District of California on July 31, 1972. Appellees Armendariz, Johnson, Jaramillo, and San Francisco Waitresses, Cashiers, Food Checkers, Cafeteria, Creamery, Fountain, Dairy Lunch and Bus Girls Union Local No. 38 commenced their action in the Supreme Court of the State of California on August 16, 1972. Appellant removed the case to United States District Court on August 24, 1972.

The *Armendariz* appellees moved to stay proceedings pending state court resolution of their claims under the California Constitution. After this motion was denied, the two actions were ordered consolidated on December 5, 1972. The Consolidated Complaint was filed on December 27, 1972.

AFL-CIO; California State Council of Carpenters; United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; Printing Specialties and Paper Products Union District Council No. 2; Social Services Employees Union, Local 535; Alameda County Central Labor Council, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO, petitioned the Court for leave to intervene on behalf of their female members. Leave to intervene was granted on January 30, 1973. Intervenors seek the relief sought by other appellees herein and in addition ask that relief be granted retroactively to December 14, 1969.

Judgment was entered on June 15, 1973, pursuant to F.R.Civ.P. Rule 54(b), holding that the challenged provision denied women the equal protection of the laws guaranteed by the Fourteenth Amendment and enjoining its further enforcement.[2] Appellant's motion for rehearing was denied on August 7, 1973. This appeal followed.

II.

CALIFORNIA'S TEMPORARY DISABILITY INSURANCE PROGRAM STRUCTURE

California is one of five states to supplement its unemployment insurance or workmen's compensation program with a disability insurance program providing benefits to persons unable to perform their custom-

[2]The Court did not reach the independent state grounds asserted by Appellees. Nor did it adjudicate Appellees' prayer for an award of attorneys fees, or their claim for retroactive application of the judgment. Pursuant to Rule 54(b), the issue of attorneys fees and retroactivity remain to be adjudicated.

ary work due to a physical or mental condition not covered by workmen's compensation.[3] The broad outlines of the California program were ably described by the District Court:

> The disability insurance program is wholly supported by employee contributions. At present, employees must contribute one percent of their salary up to a maximum of $85 per year. [Now $90, per Stats. 1973, c. 1026.] *Id.* §§984, 985, 2901. In order to be eligible to receive benefits, previous to the time of his disability an employee must have contributed one percent of a minimum income of $300 during a one year base period. *Id.* §2652. Having satisfied this requirement, an employee is eligible to receive "basic benefits" varying between $25 and $105 per week, depending upon the amount earned during the base period, for a maximum of twenty-six weeks.[3] *Id.* §§2653,

[3]This amount, however, cannot exceed one-half of the total wages paid to the individual during his base period. CALIF. UNEMP. INS. CODE §2653.

[2]Other states with temporary disability insurance programs are Rhode Island (R.I. GEN. LAWS §§28-39-1 to 28-41-32), New Jersey (N.J. REV. STAT. §§43:21-25 to 43:21-56, also §43:21-7), New York (N.Y. LAWS 1949, ch. 600, adding §§200-242 to N.Y. WORKMEN'S COMPENSATION LAW), and Hawaii (HA. REV. STATS. L. 1969, ch. 392). For a summary description of the programs in the first three of these states, see S. Riesenfeld, Temporary Disability Insurance (Hawaii Legislative Reference Bureau, Report No. 1, 1969). The federal railroad program also maintains a disability insurance program. 45 U.S.C. §§351 *et seq.*; see especially §351(k).

"Temporary disability" in all these programs may generally be said to refer to "a period of six months or less during which a worker is temporarily unable to perform his regular or customary work, by reason of a physical or mental condition or accident, not covered by workmen's compensation. Generally, it includes also the first six months of a longer disability." CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN (DEP'T OF LABOR), REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES 8 (1968).

2655. These benefits begin on the eighth day of disability, or, if the person is hospitalized, on the first day of hospitalization. *Id.* §§2627(b), 2802. While hospitalized, an employee is also eligible for a maximum of twenty days. *Id.* §2801. The fund is protected against false claims by the requirement that claims be accompanied by the affidavits of a licensed medical practitioner attesting to the existence of a disability and by the requirement that an employee must submit to such reasonable examinations as the Department may require. *Id.* §§2627(c), (d), 2708, 2710.

359 F.Supp. at 794.

As the District Court went on to point out, the California program covers disability due to virtually any cause, with the exclusive exception of disabilities caused by pregnancy and parturition. 359 F.Supp. at 794.

California has made several important choices in structuring its program. Because Appellant has sought to justify the exclusion of birth-caused disabilities by reference to the alleged operation or purposes of the California program, it is important at the outset to explore the Legislature's intent in enacting the California program, as that intent is reflected in legislative structuring of the program.

The Legislature has stated its basic intent in Section 2601:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unem-

> ployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

The Legislature has ensured the "liberal construction" of the program in several important respects, contrary to Appellant's contentions: (1) California has chosen to pool all risks rather than use actuarial principles; (2) California has extended coverage to persons whose present and future connection with the labor force may be very tenuous; (3) California has chosen to pay proportionately greater benefits to lower paid workers; and (4) California has chosen to compensate virtually any disability, regardless of possible voluntariness. These choices, among others, distinguish California's disability insurance program from others, especially from the private employer-financed plans with which Appellant seeks to identify.

A. California has chosen to pool all risks rather than distribute costs or benefits according to actuarial principles.

California could have chosen to tax different classes of employees differently for disability insurance depending on an actuarial evaluation of their morbidity experience, that is, their predicted rate of disability claims. Benefit amounts might also have been classed according to actuarial principles, giving fewer benefits to certain classes of employees who were actuarially determined to represent a large drain on fund resources. Alternatively, California might have allowed a substantial percentage of private employers to substitute their separately financed plans for the state

plan, thereby allowing employers with lower risk employees to insure that class of employees at a lower cost than the cost borne by higher-risk employees insured by the state program.[4] If California had chosen *any* of these alternatives, Appellant could colorably argue that the state uses actuarial principles in its disability insurance program and might therefore use such principles to exclude, on some actuarial basis, pregnancy-caused and parturition-caused disabilities from coverage.[5]

But California has chosen to charge all covered employees at the same rate, regardless of risk, and to ensure that lower risk and higher risk individuals are

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[4]The choice would not be unique. Under New Jersey's program, where employers help finance the plan, employer contributions vary from 35/100 of 1% to 1½% of covered wages depending on the risk experience of its employees. N.J. REV. STAT. §43:21-7(e)(3)(D)(1), (2), (3), (4), (5). New Jersey also allows substantial numbers of employers to opt out of the state fund and insure their own employees. In 1967 only 52.9% of all jobs and 51.3% of all wages were covered by the state plan. N.J. Div. of Employment Security, Annual Report 1966 and 1967, Table 36, reprinted in S. Riesenfeld, *supra* note 3, at 20. New York's program is financed entirely by individual employers and their employees, with privately determined benefit structures predominating. Private plans must provide the "actuarial equivalent" of 60% of a statutory benefit list, as determined by actuarial morbidity tables. See Reg. 41(b)(4) of the N.Y. Workmen's Comp. Bd. Financing of plans in New York obviously depends on the risk experience of any given firm's employees.

[5]In New York's program, employers are given a fairly broad latitude in choosing which disabilities shall be covered. For California to exclude pregnancy-caused and parturition-caused disabilities on the basis of some actuarial principle, it would have to demonstrate not only that it used or permitted the use of actuarial principles in financing the program, but also that it used or permitted the use of such principles in deciding which disabilities to cover. Instead, the voluntary plans which California allows must cover all disabilities covered by the state plan, and cannot result in substantial selection of risks adverse to the disability fund. CAL. UNEMP. INS. CODE §§3254(a), 3254(i).

all members of the same risk pool, thus effectively charging lower risk employees more than actuarial principles might warrant and charging higher risk individuals less. This concept of treating all risks equally leads to the creation of what has been called a "pooled fund."

The pooled fund is created by charging all covered employees at the same rate, regardless of predicted risk, and by limiting private plans. Private plans are limited in part by requiring that all such plans afford benefits *greater* than the state plan (UNEMP. INS. CODE §3254(a)), and, of greater importance, disallowing all voluntary plans which would "result in a substantial selection of risks adverse to the Disability Fund." (UNEMP. INS. CODE §3254(i); *see also* 22 CAL. ADMIN. CODE §3254(i)-2(k)(1)(B).) As of January 1971, only seven percent of covered employees were insured by voluntary plans.[6]

In 1965 the California Assembly's Joint Committee on Unemployment Compensation Disability Insurance made a major study of the operation of the California program. In its Final Report it commented on this aspect of the program's structure:

> Where no employer contribution is required and the employee contribution is on a flat-rate basis, there will be differences in the benefit/income ratio for various groups of employees. Stated

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[6]MILLIMAN & ROBERTSON, INC., ACTUARIAL REPORT OF THE UNEMPLOYMENT COMPENSATION DISABILITY FUND: 1970 (1971) at 21, attached as Exhibit A to Plaintiffs' Points and Authorities in Support of Petition for Writ of Mandate).

> simply, the good risks carry the bad ones; and this is the essence of the *pooled* fund.
>
> In California the modifications of the pooled fund concept lie in self-insurance, and in private insurance as restricted by the adverse selection provision. The latter has some effect in requiring the private carriers to assume a certain proportion of the inferior risks. . . .
>
> The flat-rate contribution principle leads inevitably to the pooled fund, for all practical purposes. Groups of employees, no matter how classified, will vary somewhat from one another in their cost rates. The flat-rate contribution collects more than is needed from some groups of employees in order to pay more to other groups of employees than is contributed by them. The principle, with minor modifications, is deeply embedded in the California system. Its abandonment would require a radical revision of the present financing structure. There appears to be little reason to believe that such a revision is supported by a major proportion of either employers or their employees.[7]

Appellees of course express no opinion regarding the validity of private insurance programs which may or may not charge or determine coverage on the basis of actuarial principles. What is clear is that Appellant may not be heard to argue on the basis of actu-

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[7] California Assembly's Joint Comm. on Unemployment Compensation Disability Insurance, Final Report 27-28 (1966).

arial principles; California simply does not use them, relying instead on a pooled risk system.[8]

B. California has chosen not to tie eligibility for benefits to present or future employment.

California determines eligibility for benefits, once disability has been established, solely on the basis of past contributions to the Disability Insurance Fund. Present or future participation in the labor force has no relationship to eligibility. Indeed, benefits are even payable to the deceased. Unemployment Insurance Code Section 2705 provides in pertinent part:

> Where an individual who would be eligible to receive disability benefits dies before making a claim therefor, the director may in accordance with authorized regulations allow the filing of a claim for such benefits by a person legally entitled thereto. . . .

The Director has issued implementing regulations. 22 CAL. ADMIN. CODE §2705-1.

Of more financial import to the program, benefits are provided for persons who become disabled while they are unemployed, so long as they earned the minimum $300.00 during the applicable twelve month base

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[8]The extent to which California departs from actuarial principles used by many private insurance companies is illustrated by the fact that employees are covered under the California program regardless of any mental or physical condition existing at the time the employee becomes covered under the program. Many private insurance policies exclude coverage of preexisting conditions which later become disabling, on the theory that the risk of disability is too high to insure. California not only insures such risks, but also requires that all voluntary plans cover employees regardless of preexisting mental or physical conditions. 22 CAL. ADMIN. CODE §3254-2(d).

period. The beginning of that base period may antedate disability by as many as 31 months. UNEMP. INS. CODE §§2610, 2611; see also Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 134.) That California has chosen to grant benefits to the unemployed disabled—regardless of the cause of their unemployment—has more than casual significance because the unemployed disabled make proportionately more claims on the program resources. As a group, the unemployed represent only 6.0% of the covered population, but comprise approximately 14% of all claims and benefits paid.[9] Were the Legislature concerned with limiting benefits to persons

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[9]The California civilian labor force was 8,610,000 in 1970, of whom 519,000, or 6.0%, were unemployed. (Milliman & Robertson, Inc., *supra* note 6, Table 1 of Statistical Handbook.) The unemployed disabled represented approximately 14% of all "first claims" (*id.*, Table 6) and approximately 14% of all benefits paid in that year (*id.*, Tables 9 and 11). While only 11.2% of the employed disabled exhausted their benefit eligibility, and had an average disability duration of 7.6 weeks, 22.4% of the unemployed disabled exhausted their benefits, and the unemployed disabled had an average duration of disability of 10.4 weeks (*id.*). Similarly, the unemployed disabled use a greater proportion of hospital benefits, representing 14% of all hospital benefits paid, due to a greater average claim duration (9.6 days as compared to 7.6 days for the employed disabled) and a greater exhaustion rate (20.2% to 10.1%) (*id.*, Tables 10 and 12). These figures hold true for virtually every year of the program, and were noted at length in the Joint Committee's Final Report in 1966. See Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 16-19. See also Department of Human Resources Development [HRD], California Disability Insurance Terminated Claims 1970 (June 16, 1971) and 1971 (May 22, 1972), Tables 1-8.

Financing the payment of benefits for the unemployed disabled is accomplished by placing 12% of all state plan contributions, plus an equivalent amount taxed to the few voluntary plans, in a specially designated Unemployed Disabled Account. UNEMP. INS. CODE §§3012(b), 3252(b). Benefits for this group currently cost more than is allocated as a percentage of net con-

whose disability was merely a gap between periods of gainful employment, it surely would have done so by limiting the eligibility for benefits of this relatively costly and readily identifiable group.[10]

The Assembly Joint Committee which studied the program in 1965 was concerned about the high claims rate of the disabled unemployed, and noted the high percentage of such claimants whose earnings were concentrated in one or two quarters of the year. (Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 36.) The Committee went on to discuss the status of part-time workers, who may be said to be in an intermediate position between the unemployed disabled and full-time permanent workers. The California program did and does contain substantial biases in favor of part-time workers. As the Committee noted, eligibility is conditioned only upon total wages ($300.00) made in the base year,

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tributions. Milliman and Robertson, Inc., *supra* note 6, at Table 15.

For present purposes it may be of interest to note that women, approximately 38.8% of the labor force in 1970 (*id.* at Table 3), accounted for 39.6% of regular state plan payments but only 31.5% of payments to the unemployed disabled. (HRD, California Disability Insurance Terminated Claims 1970, *supra*, Table 2.) In other words, men are overrepresented in the costly category of the unemployed disabled.

[10]Such limitations might have included restricting the eligibility of the unemployed disabled to those also found eligible for unemployment insurance, or by requiring that the disability occur within a short time of leaving covered employment. The New York law, for example, requires the onset of disability to occur within twenty-six weeks following the termination of covered employment. N.Y. WORKMEN'S COMP. LAW, §§207(1) and (2). In California the onset may occur as much as 19 months after leaving such employment. New Jersey conditions the eligibility of the unemployed disabled upon eligibility for unemployment insurance. N.J. REV. STAT. §43:21-4(f)(1).

with no requirement of minimum earnings for a certain number of weeks.[11] The amount of benefits to which one is entitled is not related to average weekly wages over the last year, but rather to the highest amount earned in any one of the four quarters of the base year period, thus substantially favoring the more highly paid part-time worker over the permanent full-time average wage earner.[12] The 1965 Committee recommended that benefits be tied to average weekly wages over the entire 12-month period, in order to favor full-time workers.[13] The Legislature did not agree with the Committee recommendation, and the California program continues to differ from other

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[11]CAL. UNEMP. INS. CODE §2652. New Jersey requires earnings of not less than $15.00 per week for at least 17 weeks. N.J. REV. STAT. §§ 43:21-27(i), 43:21-41(b). Rhode Island requires earnings of $20.00 for each of 20 weeks or $1200 during the base period regardless of weeks worked. R.I. GEN. LAW §28-41-11. Maximum duration of benefits in Rhode Island is 60% of the number of weeks worked or 26 weeks, whichever is less. R.I. GEN. LAWS §28-41-7.

[12]CAL. UNEMP. INS. CODE §2655. Benefits are limited to 50% of all base period earnings, but the disparity between benefits for intermittent and full-time workers is still substantial. For example, a person making $4000 per year with earnings of $1000 in each quarter would be entitled to a maximum of 26 weeks of benefits at $45 per week, for a total of $1170 in benefits. A person making $4000 per year by making $1775 in one quarter and lesser amounts in other quarters would be entitled to 26 weeks of benefits at $76 per week, for total benefits of $1976. Put another way, a person making $2340 in one quarter, who is unemployed the rest of the year, is entitled to the same total benefits as the steady worker making $4000 per year.

Other states base benefits on a weekly average of wages, rather than reward persons with erratic wage earning behavior. *See, e.g.*, N.Y. WORKMEN'S COMP. LAW §§ 201(13), 204(2); N.J. REV. STAT. §§43:21-3(c), 43:21-27(i) and (j); R.I. GEN. LAWS §28-39-2(21).

[13]Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 39.

state and private programs by favoring persons whose participation in the labor force may be only intermittent.

Benefits are also provided for persons who are known to have a relatively low rate of immediate return to the labor force. Appellant's own Department made a study in 1966 of the subsequent labor force status of persons who exhaust their basic benefits.[14] (Department of Employment Report 1200 No. 12 (1966), reprinted in Joint Committee on Unemployment Compensation Disability Insurance, Final Report, *supra* note 7, at 112-116.) This study found that return to employment is dependent on age, not sex.[15] What is striking, however, is that fewer than half the 9275 exhaustees studied had returned to work within one year after exhausting benefits. Were the Legislature concerned with future labor force participation, it might well have limited the duration of benefits, either absolutely or according to age.

The fact is that the Legislature has not shared Appellant's newly articulated concern that benefits be paid only to individuals who belong to a group whose statistical group behavior indicates an immediate return to work following disability. However relevant

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[14]Exhaustion of benefits occurs at the end of 26 weeks of benefits, or when benefits equal to 50% of the individual's base year total wages have been received. CAL. UNEMP. INS. CODE §2653.

[15]Women returned to work within a year after exhaustion of benefits slightly more frequently than men. Men constituted 60.3% of the group studied, but only 58.9% of those finding employment. Approximately 57% of the exhaustees under age 45 returned to work but fewer than 33% of persons over age 55 did so. *Supra* note 7 at 112-116.

such a concern may be to private employers insuring their own employees, it has no relevance to California's pooled fund program.[16]

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[16]Appellant goes so far as to characterize disability payment made to non-returning individuals as "severance" or "early retirement" pay. Appellant's br. at 21. Appellant confuses the purpose of California's program with possible purposes of private insurance plans. Private employers may institute such a plan not for the altruistic and compensatory reasons behind the California program, but rather as an incentive to employee loyalty and longevity with the particular company. Fringe benefits in private industry may thus serve as a form of wages designed to protect employer investment in employee training and experience as a component of productivity and therefore profits. Thus Amicus Curiae General Electric Company, in its 1956 Annual Report, stated:

> General Electric's emphasis on the worthwhile personal satisfactions of its employees carries into the Company's attitude toward the compensation of employees in exchange for their interest, initiative, skill, care, effort and teamwork. Compensation at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs. . . .
>
> (*Id.* at p. 12)

In its 1957 Annual Report, General Electric emphasized its benefit programs as an incentive to employee loyalty:

> General Electric's employee benefit plans are particularly effective in helping to attract top-quality people at all levels and encouraging them to make their careers with the Company.
>
> (*Id.* at p. 18)

See also D. ALLEN, FRINGE BENEFITS: WAGES OR SOCIAL OBLIGATION (Rev. Ed. 1969).

If the disabled employee does not return to employer X, X has lost his investment in worker experience, whether or not the employee remains in the labor force at some other job. The employer's risk of loss is external to his system, and each employer has that same risk.

The California program involves none of these problems. The employer invests nothing in the program and has no call upon it. The State has no programmatic interest in the future employment of covered workers. Even if it did, for reasons beyond Appellees' comprehension, that purpose would be served by eventual return to the labor force in some occupation, including part-time work, and would not be frustrated by a one- to three-year break in labor force participation. In short, whatever the rational

C. California has chosen to pay proportionately greater benefits to lower paid workers.

California's disability insurance program, like many insurance programs, relates benefit amounts to the individual employee's contributions to the fund. The relationship between contributions and benefits, however, is neither direct nor proportional. First, as previously noted (*supra,* p. 16)), benefit amounts are based on the highest earnings (and hence, contributions to the fund) in any one of the four quarters of the base year period. Employees with fewer earnings (and contributions) can thus get more in benefits from the fund than others, so long as their earnings are concentrated in one quarter of the year.[17]

Of even greater importance, the percentage of *weekly* wage loss replacement is set much higher for lower paid workers, thus creating a progressive benefit structure designed to pay lower paid workers proportionately *more* as a class than they contribute. Thus the full-time year round employee making $50 per week is eligible for $31 per week in benefits, or re-

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basis of private employer concerns regarding immediate return to the labor force, the validity of which is not at issue here (*cf.* Stanley v. Illinois, 405 U.S. 645 (1972)), California has no such basis. What may be "severance" pay to the private employer is still simply a paid-for insurance benefit in California's employee-financed program.

[17]For the steady worker who exhausts his 26 weeks of benefits, total benefits replace no more than approximately 33% of total wages. *E.g.*, the employee making $600 per quarter, or $2400 per year, is entitled to weekly benefits of $29, or total maximum benefits of $754, which is equal to approximately 31.5% of total wages. An employee making the same total per year, concentrated all in one quarter, would be entitled to $101 per week for 11.8 weeks, for total benefits of $1200, or 50% of total yearly wages.

placement of 62% of weekly wage loss. The $100 per week employee gets $57 weekly, or a 57% replacement. The $200 per week employee gets $105 weekly, or a 50.25% replacement, and workers making more than $200 per week also get $105 per week, for less than 50% replacement of weekly wage loss.

Therefore, although California may be entitled to tie benefit amounts to individual contributions, *Shapiro v. Thompson,* 394 U.S. 618, 633, n.10 (1969) it has chosen to ensure that *any* class of workers which earns less than the average wage will be paid proportionately more in benefits than they contribute to the fund.[18]

D. California has chosen to extend coverage to virtually any disabling condition.

In furtherance of its stated intent to "mitigate the evils and burdens which fall on the unemployed and disabled worker and his family" (UNEMP. INS. CODE §2601), California has chosen to compensate work loss for virtually any reason. The legislation speaks in terms of "illness or injury" as well as terms of "physical or mental condition," and it is presumed that benefits are paid in conformity with legislative intent. Appellant's workaday administration of the program

[18]This choice has been a conscious one. In 1966 the Assembly's Joint Committee recommended that benefits be changed to favor fulltime, better paid workers. The Committee recommended that wage loss replacement be highest for workers with earnings of $6500 per year, and only two thirds as much for workers at the bottom rung of eligibility. See Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 38-41. The Legislature refused to change the current structure, preferring to subsidize more poorly paid workers.

reveals that the Legislature's mandate to construe the disability legislation "liberally in aid of its declared purposes" has been carried out. Benefits are paid upon certification of disability by the attending physician, dentist, or podiatrist (UNEMP. INS. CODE §§2708, 2710), regardless of the voluntariness, predictability, uniqueness, or "normalcy" of the disability. Many of the conditions compensated are not thought of as injuries or illness in lay terms.

Compensation is provided, for example, for disabilities caused by cosmetic plastic surgery, usually thought to be a voluntarily created disability. Compensation is provided for disability caused by an auto accident resulting from the disabled's drunk driving.[19] Disabilities resulting from voluntary sterilizations are compensable, as are disabilities resulting from barroom brawls initiated by the disabled. Obesity, which may result from voluntary action, is similarly compensable when it disables a worker from performing his or her customary or regular work. Disability resulting from a sex-change operation is also compensable.

It may of course be argued in the individual case that the cause of any of these "voluntary" disabilities

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[19]This Court has ruled that alcoholism per se is not so involuntary a condition as to allow an individual to escape prosecution for public drunkenness. Powell v. Texas, 392 U.S. 514 (1968). Although the majority and dissenters disagreed in *Powell* as to the voluntariness of alcoholism itself, there was unanimous agreement that drunk driving should still be considered sufficiently voluntary to subject the intoxicated driver to criminal sanctions. 392 U.S. 514, 534, 559. As the dissent commented, the additional behavior of driving requires "independent acts or conduct and does not typically flow from and [is] not part of the syndrome of . . . alcoholism." 392 U.S. 514, 559 at n. 2.

is not a "voluntary" act on the part of the disabled but rather stems from psychological "compulsions" or other mental illness. The program makes no such distinctions in assessing eligibility for benefits. Appellant may thus in a common sense way be said to compensate many disabilities resulting from voluntary action.

Similarly, the California program compensates disabilities without regard to their predictability. Many private insurance policies exclude coverage for disabilities caused by mental or physical conditions already existing at the time coverage begins, but California compensates all such disabilities. (See discussion, *supra* note 8; 22 CAL. ADMIN. CODE §3254-2(d).) Thus an individual with degenerative arthritis, who will almost certainly become disabled for many types of employment, is eligible for benefits after earning the required minimum. Similarly, cataract operations and prostatectomies, which may be planned long in advance are compensable under California's program regardless of the employee's advance knowledge of the approaching disability and regardless of its certain occurrence at the time of coverage. *See Green v. Waterford Board of Educ.*, 473 F.2d 629 (2d Cir. 1973). California's choice in this regard has been deliberate, as its express requirement that pre-existing conditions be covered by voluntary plans (22 CAL. ADMIN. CODE §3254-2(d)) demonstrates. California's decision to include pre-existing and pre-planned disabilities once again reflects the Legislature's broad interpretation of the pooled fund concept of disability insurance and its

singular legislative purpose of compensating individuals and their families for lost wages regardless of the nature or cause of the disabling event.

It may also be noted that California regularly compensates disabilities regardless of their concentration in or uniqueness to a given class of covered workers. Hemophilia, prostatectomies, and other disabilities unique to males, as well as hernias, which are concentrated in the male population, are all compensated. Sickle cell anemia, which is practically unique to blacks, is similarly compensated. Heart attacks and other disabilities concentrated among older workers are also compensated. The pooled fund concept is inconsistent with any other treatment of disabling conditions, regardless of incidence among various groups in the California population.

Finally, it comes as no surprise that California has not chosen to treat disabilities differently by any classification labeled "normal" and "abnormal." The statistical or other "normalcy" of one's disability has nothing to do with eligibility in the California program. Whether it is "normal" to have two colds per year or 2.1 children per family, or whether the state of pregnancy or parturition is "normal" in a statistical or medical sense would present grave problems for the California program as presently structured, since its only concern is whether a particular condition is disabling or not.[20] Benefits are paid for disabilities

[20]The concept of "normalcy" is probably even less universally and objectively definable than the concept of "voluntariness" discussed above. As applied to most disabilities, however, the best that can be said is that the word "normal" is used to denote

caused by such commonplace and non-dangerous conditions as removal of irritating wisdom teeth, other orthodonture, and recovery from hair transplants used to disguise natural baldness. The "normalcy" of a disability is not relevant in any sense, any more than voluntariness, predictability, or uniqueness to eligibility for benefits in the California disability insurance program.

SUMMARY OF THE ARGUMENT

California excludes only one type of disability from its comprehensive state disability insurance program —disabilities caused by "normal" childbirth. Such disabilities arise from pregnancy, a physical process unique to women. Classifications based upon physical characteristics unique to one sex are sex-based classifications. Sex unique characteristics, particularly the capacity to become pregnant, are what define a person as a man or a woman, and the legal benefits or burdens which are based on such characteristics are burdens or benefits conferred because of a person's gender-identity. As with other types of sex discrimination, discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny. Most

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statistically prevalent conjunctions of traits. *Cf.* E. NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION, 49-52, 56-73 (1961). See also Murphy, *A Scientific Viewpoint on Normalcy*, 9 PERSPECTIVES IN BIOLOGY AND MEDICINE 333 (Spring 1966). To say that pregnancy or childbirth are "normal" states or processes ignores the substantial injury and risk to female organs and tissues that occurs during parturition as well as the infrequency with which any individual is found in that state.

laws which classify on the basis of pregnancy affect women in areas where they are in competition for jobs or job-related benefits such as sick leave or disability benefits. Whether differential treatment on the basis of pregnancy is justified must depend upon the purpose of legislation and whether the differences between that "unique" characteristic and other characteristics are relevant to that purpose.

Appellees contend that the proper standard of review in this case is strict scrutiny, first, because sex-based classifications meet all the traditional criteria for "suspectness" and second, because the challenged exclusion burdens the exercise of the fundamental right to choose to bear a child. However, under either the strict scrutiny standard advocated by Appellees, or the scrutiny standard required in sex discrimination cases by *Reed v. Reed,* 404 U.S. 71 (1971), the statutory exclusion of pregnancy- and parturition-caused disabilities from the state disability insurance program is unconstitutional.

The California program is a pooled risk fund. No risk is excluded because it is higher than others, nor does the contribution rate vary according to the degree of risk posed by certain classes (the older worker, the low wage earner). Since actuarial principles are eschewed in favor of the pooled risk system, actuarial data cannot selectively be used by the state as a justification for excluding pregnancy- and parturition-related disabilities.

Moreover, while pregnancy itself is *not* a disability, disabilities *caused* by pregnancy and childbirth are

similar to disabilities now compensated in all relevant respects. It is common medical knowledge that virtually the entire reproductive tract of a woman is injured to some extent during childbirth. While the extent and severity of the disability varies, virtually all women suffer from disabling injuries for some period of time during labor, delivery and the puerperium.

Appellant seeks to justify the exclusion on the ground that pregnancy-related disabilities are voluntary. Yet, to the extent that pregnancy-related disabilities can be said to be voluntary, so can other disabilities currently compensated by the disability fund, such as the disabilities which result from cosmetic surgery or sex-change operations.

Appellant contends that because almost half of the working women who give birth do not return to the labor force immediately after delivery, the state is justified in excluding their disability from coverage. But the program covers all disabilities without regard to the disabled individual's present or likely future attachment to the labor force or a particular job. And, in any event, Appellant may not exclude all birth-caused disabilities from coverage on the basis of a sex stereotype admittedly inapplicable to over half the class thereby excluded.

The administrative convenience of excluding all disabilities caused by pregnancy and childbirth on the ground that women and their doctors will defraud the program cannot justify their exclusion from coverage. The program already has built-in safeguards against fraudulent claims and, while physicians may initially

need guidelines on eligibility for benefits, there is no reason to believe they will intentionally thwart the goals of the disability program. In any event, even if it were proven that some women would purposely make false claims and some doctors would intentionally disregard guidelines, the resultant exclusion of all claims, all of which have *some* validity, is arbitrary.

Appellant contends that women already benefit disproportionately from the fund and that this alleged benefit differential justifies continued exclusion of pregnancy- and birth-related disabilities. However, since the state has chosen a pooled risk rather than an actuarial-based program, it cannot resort to actuarial considerations to justify its refusal to pay benefits for a disability unique to women. In any event, income and age, rather than sex, are the significant variables in predicting disability experience. Women receive benefits disproportionate to their contributions to the fund *only* because they are low wage earners and the program is structured disproportionately to benefit such workers.

Moreover, Appellant exaggerates the cost of extending coverage to disabilities caused by pregnancy and parturition. Appellant's estimate of a cost of $120.2 million is based on false assumptions as to the frequency and duration of disabilities caused by childbirth and failure to eliminate costs not related to those particular disabilities. Appellees estimate the cost to be $48.9 million, rather than the $120.2 million estimated by Appellant.

Finally, whether the cost of providing the incremental coverage is $48.9 million or two and a half times that amount, Appellant cannot justify his otherwise irrational classification on the ground of cost alone. If California wishes to limit the costs of its employee-financed program it may do so by excluding or limiting all claims in excess of certain amounts, or by any other constitutional means, but it may not economize at the expense of women disabled by pregnancy- and birth-related disabilities when their disabilities are not distinguishable from those already covered by the program.

ARGUMENT

I

CLASSIFICATIONS BASED UPON PHYSICAL CHARACTERISTICS UNIQUE TO ONE SEX ARE SEX-BASED CLASSIFICATIONS

Perhaps no issue in the emerging law of sex discrimination has greater ramifications for women than does the question whether laws treating a physical characteristic unique to one sex create classifications based on sex. Its resolution in the context of the equal protection clause will almost certainly affect the interpretation of Title VII of the Civil Rights Act of 1964, Executive Order 11246 and, if ratified, the Equal Rights Amendment.[21] At the same time, no issue has presented more thorny conceptual problems for courts

[21]Guidelines issued pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* which prohibits employment discrimination on the basis of race, religion, national origin and

deciding challenges to laws on the ground that they discriminate on the basis of sex.[22] Typical of the con-

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sex, provide that: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. §1604.10. Proposed sex discrimination guidelines issued by the Department of Labor pursuant to Executive Order 11246 which prohibit sex discrimination by government contractors contain a pregnancy provision virtually identical to the EEOC's pregnancy guideline. Proposed §60-20(h)(2), 41 C.F.R. published in 38 Fed. Reg. 35336, 35338 (Dec. 27, 1973). See also Department of Health, Education and Welfare, Higher Education Guidelines, 37 Fed. Reg. 24686 (1972).

[22] *Compare, e.g.*, Buckley v. Coyle Public School System, 476 F.2d 92, 95-97 (10th Cir. 1973); Green v. Waterford Board of Educ., 473 F.2d 629, 634-36 (2d Cir. 1973); Seaman v. Spring Lake Park Independent School Dist., 363 F.Supp. 944 (D. Minn. 1973); Heath v. Westerville Board of Educ., 345 F.Supp. 501, 507 (S.D. Ohio 1972); Bravo v. Board of Educ., 345 F.Supp. 155, 157-59 (N.D. Ill. 1972); Williams v. San Francisco Unified School Dist., 340 F.Supp. 438, 443 (N.D.Cal. 1972); Struck v. Secretary of Defense, 460 F.2d 1372, 1378 (9th Cir. 1972), *cert. granted*, 409 U.S. 947 (1972), *judgment vacated and case remanded for determination of mootness*, 409 U.S. 1071 (1972), dissenting opinion of Duniway, J.; Robinson v. Rand, 340 F.Supp. 37 (D. Colo. 1972); Pocklington v. Duvall County School Board, 345 F. Supp. 163, 164 (N.D.Fla. 1972) *with* Shattman v. Texas Employment Comm., 459 F.2d 32 (5th Cir. 1972), *cert. den.*, 409 U.S. 1107, *reh. den.*, 410 U.S. 959 (1973); Paxman v. Wilkerson, ___ F.Supp. ___, 5 F.E.P. Cases 675 (E.D.Va. 1973); Gutierrez v. Laird, 346 F.Supp. 289, 292 (D.D.C. 1972); Godwin v. Patterson, 363 F.Supp. 238, 240-41 (M.D.Ala. 1973); Miller v. Industrial Comm'n., 173 Col. 476, 480 P.2d 565 (1971). *See also* Newmon v. Delta Air Lines, Inc., ___ F.Supp. ___, 5 E.P.D. ¶8533 (N.D. Ga. 1972); *aff'd* 475 F.2d 768 (1973), BNA, Daily Labor Report, Jan. 25, 1974 (final order); Vick v. Texas Employment Commission, ___ F.Supp. ___, 6 E.P.D. ¶8932 (S.D. Texas 1973); Wetzel v. Liberty Mutual Ins. Co., ___ F.Supp. ___, 7 E.P.D. ¶9097 (W.D.Pa. 1974); EEOC Decision 70-360, CCH EEOC Decisions ¶6084 (1969); EEOC Decision 71-308, CCH EEOC Decisions ¶6170 (1970); EEOC Decision 72-0372, CCH EEOC Decisions ¶6412 (1971); EEOC Decision 72-1919, CCH EEOC Decisions ¶6370 (1972); EEOC Decision 73-0479, CCH EEOC Decisions ¶6381 (1973); EEOC Decision 23-0520, CCH EEOC Decisions ¶6389 (1973) (which treat the pregnancy issue under Title VII of the Civil Rights Act of 1964).

ceptual loggerheads at which courts find themselves are the majority and dissenting positions in *Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1972), rev'd ___ U.S. ___, 42 U.S.L.W. 4186 (1974),[23] (in which a school teacher challenged a regulation requiring her to take an unpaid leave of absence after her fifth month of pregnancy).

In the Fourth Circuit's *Cohen* decision, Chief Judge Haynsworth, writing for the majority, asserts that because such classifications are based upon a unique physical characteristic they *cannot* be sex-based:

> "Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood."
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> 474 F.2d 395, 397.

Judge Winter, dissenting, concludes that because such classifications are based on a unique physical characteristic, they are *necessarily* sex-based:

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[23]This Court struck down the mandatory maternity leave provision on due process grounds and therefore did not reach the question of the treatment of physical characteristics unique to the sexes under the equal protection clause of the Fourteenth Amendment.

"'The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life-tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.' . . . 'Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex.'"

474 F.2d 395, 401.

Taken one step further, the conceptual difficulties suggested by the majority and dissenting opinions in *Cohen* prove illusory. The individual who receives a benefit or suffers a detriment because of a physical characteristic unique to one sex benefits or suffers because he or she belongs to one or the other sex. Sex-unique physical characteristics are precisely what define a man or woman as a member of one class or the other.[34] These definitional characteristics have historically been the source and justification for the often unwarranted differential treatment of men and women. Whether differential treatment on the basis

[34]Judge Weber, in Wetzel v. Liberty Mutual Ins. Co., ___ F. Supp. ___, 7 E.P.D. ¶9097 (W.D.Pa. 1974), a Title VII action, treats this question more humorously but perhaps no less insightfully: "As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt: 'If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind'." (___ F.Supp. ___, 7 E.P.D. at 6613.)

of such physical characteristics is justified must depend upon the purpose for which the classification was created and upon whether the "uniqueness" of the physical characteristic is relevant to that purpose.

Judge Haynsworth's observation that "the fact that only women experience pregnancy and motherhood removes all possibility of competition in this area" is accurate *only* where a statute is narrowly drawn and the congruence between the classification and the purpose is virtually perfect, as, for example, a rule which granted a leave of absence from work for nursing mothers. Most laws which single pregnant women out for different treatment are not so finely tailored and do affect them in an area where they compete.[25]

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[25]Although other sex-unique characteristics of men and women are occasional bases of legislation (e.g., rape laws, regulation of beards), the physical characteristic which is most pervasively used to differentiate the legal status of men and women is the capacity of women to become pregnant. *See generally*, Hillman, *Sex and Employment under the Equal Rights Amendment*, 67 Nw.U.L. Rev. 789, 797-809 (1973). Because virtually all women can become pregnant, and because approximately 84 percent of married women do so at least once (U.S. Dep't of Commerce, Bureau of the Census, Census of Population 1970, Detailed Characteristics, P.C.(1)-D1-US Summary Table 212, at 41 (1971)), government and private policies or practices regarding pregnancy affect most women within their reach. In contrast, policies and practices concerning beards and laws punishing rape limit or affect a relatively small percentage of men. Therefore, the question of the legal treatment of sex-unique physical characteristics is best illuminated by focusing on pregnancy.

For a comprehensive discussion of the rape laws and sex equality see Brown, *et al*, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 954-961(1971). For an attempt to articulate a rationale for a lesser standard in the treatment of beards, male hair length and other dress and appearance issues under Title VII of the Civil Rights Act of 1964, see Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So.Cal. L.Rev. 965, 983-985, 990, 996 (1973). The author summarizes

For example, the service woman who is discharged because she becomes pregnant is in competition for a job. To the extent that her discharge occurs while she is still as fit and able to perform as those persons who are not discharged (and most women remain fit for most jobs throughout their pregnancy),[26] her pregnancy constitutes a distinction without a difference. To the extent her discharge is justified by the fact that she will be disabled for a period of time while in labor, delivery and recovery therefrom, she is in competition for whatever medical benefits, disability benefits or disability leave are available to others who are also temporarily disabled. For purposes of a benefit or leave provision, her disability is no more "unique" than any other: like other disabilities, hers has its own distinctive causes, durations, physical manifestations and cures. Like some other causes of disability, hers may result from a voluntary act (*e.g.*, cosmetic surgery, attempted suicide, obesity, sex-change operation), like others, it may result from a characteristic unique to one sex (*e.g.*, prostatectomies,

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his argument as follows: "Dress and appearance codes could be distinguished on two grounds from the other contexts in which sex plus has been rejected. First, the nature of the stereotyping with dress and appearance is different since it does not involve a sex-based perception of an individual's occupational capabilities. Second, in the context of grooming regulations, which are exclusionary, accommodation is possible since dress and appearance are alterable characteristics not involving a significant status or condition." (*Id.* at 990.) The author gives, as examples of a "significant status or condition", "having children" or "being married". (*Id.* at 996.)

[26] *See, e.g.*, Affidavits of: George C. Calderwood, Appendix p. 37; Dr. Phillip J. Goldstein, Appendix p. 38; Dr. N. R. Trueblood, Appendix p. 40; Dr. Andre Eugene Hellegers, Appendix p. 43; Dr. Elizabeth A. Crisp, Appendix p. 45.

circumcisions). Like still others, it may result from a "normal" condition (*e.g.*, removal of wisdom teeth, orthodonture, hair transplants).

The pregnant woman's competitive position is clear when men are not discharged and in fact receive leave or medical benefits for disabilities unique to their gender, but women do not. Thus, the sex-based nature of the discrimination emerges: men as a class are compensated for all disabilities which they suffer; women as a class are not compensated for all of theirs. In such a system, the class of women as a whole are disadvantaged because of their sex.

At the root of recent judicial decisions and anti-discrimination legislation, such as Title VII of the Civil Rights Act, is the principle that different benefits and burdens should not be imposed on an individual solely because that individual is of one sex or the other. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71, 75 (1971). The plurality's rationale for treating sex-based classifications as suspect in *Frontiero* provides a framework for considering why, *whatever standard of constitutionality is applied,* discrimination because of unique physical characteristics should be subjected to the same scrutiny as other sex-based classifications. In reaching the conclusion that sex should be treated as suspect, the Court looked at the historical rationales for discrimination and concluded that sex discrimination was often based on gross stereotypical distinctions between the sexes. The effect of such stereotyping was to relegate women to a second class

citizenship without regard to their individual capacities. *Frontiero,* 411 U.S. 677, 687. *Compare Reed v. Reed,* 404 U.S. 71 (1971) *with Reed v. Reed,* 93 Idaho 511, 465 P.2d 638 (1970).

At the core of the historical discrimination against women are what were then considered to be the "unique" differences between men and women, particularly pregnancy and the maternal role long considered inseparable from it. *Cf. Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130, 141 (1873). Thus, in *Muller v. Oregon,* 208 U.S. 412 (1908), the court declared:

> Differentiated by [her physical structure, the performance of maternal functions and her dependency on men] from the other sex, she is properly placed in a class by herself. . . .
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> 208 U.S. 412, 422.

Placed in a "class by herself" because of characteristics considered unique to women, she was cast outside the reach of the principle of equality for most purposes until recently. For, as Justice Frankfurter stated in holding that women could be excluded from the occupation of bartender, "[T]he Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'" *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948).

The sweeping generalization that women are "different," which justified all the legal disabilities under which they labored for centuries, has been progressively narrowed under scrutiny of the relevance of supposed differences to the purposes of legislation. In 1908, the Court was able to conclude: "That woman's

physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious" (208 U.S. 412, 421). Today, it has become apparent that if women are at a disadvantage in the struggle for subsistence it is in large part because of human rather than natural laws. As a result, many of those laws have been struck down as violating the equal protection clause.[27] We have arrived, after this narrowing process, at those differences between men and women still considered "real" in fact and opinion: the sex-unique characteristics of men and women.

Those who would make these unique physical differences a touchstone for unscrutinized differential treatment offer nothing other than the modern version of the historical rationales which were for so long the source of women's second class citizenship under the law. Statements such as Judge Haynsworth's that "no man made law or regulation . . . can relieve females

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[27]Reed v. Reed, 404 U.S. 71 (1971) (discrimination against women in appointment to administrator of estate); Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (exclusion of females from high school sports programs); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1972) (excluding females as legislative pages); Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972) (exclusion of females from restaurant service); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 (E.D.Va. 1970) (exclusion of women from state institution of higher education); Seidenberg v. McSorley's Old Ale House, Inc., 317 F.Supp. 593 (S.D.N.Y. 1970) (exclusion of females from service at ale house); Karczewski v. Baltimore & O.R. Co., 274 F.Supp. 169 (D.C.Ill. 1967) (exclusion of widows from coverage for loss of consortium; White v. Crook, 251 F.Supp. 401 (M.D.Ala. 1966) (exclusion of women from juries); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion of women from employment as bartenders).

from all the burdens which naturally accompany the joys and blessings of motherhood" (474 F.2d 395, 397) are reminiscent of the earlier manifestos of a dual system of law for men and women.[28] Significantly, and not surprisingly, the rule which was necessarily sustained under Judge Haynsworth's rationale was subsequently struck down as arbitrary by this Court. *Cleveland Board of Education v. LaFleur*, ___ U.S. ___, 42 U.S.L.W. 4186 (1974).

Placed in historical context, it should be apparent that discrimination on the basis of pregnancy, a "unique" characteristic, is not separable from previous sex discrimination, but rather part of a continuum of discrimination. For practical purposes there is no difference between refusing to permit women to become lawyers because of their physical

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[28]Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (concurring opinion) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."); Muller v. Oregon, 208 U.S. 412, 422 (1908) ("The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."); Quong Wing v. Kirkendall, 223 U.S. 59 (1912); Riley v. Mass., 232 U.S. 671 (1914); Miller v. Wilson, 236 U.S. 373 (1915); Radice v. New York, 264 U.S. 292 (1924); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) ("Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.").

and emotional differences from men[29] and refusing women certain jobs on the more narrow ground that they might become pregnant[30] or firing them because they are pregnant. The issue for courts is not whether pregnancy is, in the abstract, sui generis, but whether the legal treatment of pregnancy in various contexts is justified or invidious.

The "gross, stereotypical distinctions between the sexes," which Justice Brennan notes in *Frontiero* (411 U.S. 677, 685) flow from notions about women such as those described above, are at the root of many laws and regulations relating to pregnancy. To name just a few: the medically unsupported assumption that women's ability to function is impaired during the latter stages of pregnancy is asserted to justify mandatory maternity leaves; the assumption that she remains unable to work for long periods of time after giving birth is used to prevent her return;[31] the law which required the discharge from the military of all service women who became pregnant appeared premised on the belief that a woman's primary function is childbearing and rearing and that career interests should not be allowed to compete with

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[29] *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); *cf.* In re Lockwood, 154 U.S. 115 (1894).

[30] *See* Cheatwood v. South Cent. Bell Tel.&Tel. Co., 303 F.Supp. 754, 759-760 (M.D.Ala. 1969).

[31] *See* Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1972), *rev'd.* ___ U.S. ___, 42 U.S.L.W. 4186 (1974), and LaFleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972), *aff'd* ___ U.S. ___, 42 U.S.L.W. 4186 (1974). *See also*, Gross, *Liberty, Equality—Maternity!*, 2 CLAIMS ACTION REPORTS No. 2, at 30 (1973).

that function.[32] The assumption that pregnant women required by employers to leave their jobs do not really want to work and in any event have a husband fully able to support them is offered to justify denying them unemployment insurance although they remain able and willing to work.[33] This last prejudice—that women are not serious and permanent members of the workforce[34] and that lurking somewhere in each

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[32] *See, e.g.*, Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1972); Gutierrez v. Laird, 346 F.Supp. 289 (D.D.C. 1972). *See also* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1555-56, 1554 n.29 (1973); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L.REV. 568 (1973).

[33] *See* Hanson v. Hutt, — Wash. —, 517 P.2d 599, 603 (1974) (In *Hanson*, a unanimous Washington Supreme Court struck down a section of the Washington unemployment insurance law which made pregnant women ineligible for unemployment insurance benefits for a period beginning 17 weeks before the expected delivery date and extending through the sixth week after childbirth. In so doing, the court held that discrimination on the basis of pregnancy was sex discrimination (— Wash. at —, 517 P.2d at 601-602) and that classifications based upon sex are suspect (— Wash. at —, 517 P.2d at 602-603).

[34] The percentage of women who work has increased from 20.4 percent in 1900 to 43.6 percent in 1972. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE ECONOMIC ROLE OF WOMEN (1973), Table 21, at 91 (1973); H. Hayghe, *Labor Force Activity of Married Women*, U.S. DEP'T OF LABOR, MONTHLY LABOR REVIEW 31 (April 1973), Table 7, at 36. Forty-one and one-half percent of these women workers are married. Thirty-one percent are mothers with children under 6 years old. *Id.* at 33. The percentage of black married women in the workforce is significantly higher than for whites; in March 1971 about 53 percent of black wives were in the labor force compared to 40 percent of white wives. WOMEN'S BUREAU, U.S. DEP'T. OF LABOR, *supra* at 96. By 1972, women constituted 37.4 percent of the national workforce, in contrast to 18.1 percent in 1900. *Id.* at 91. In California, women account for more than 40 percent of the workforce. CAL. COMM'N ON THE STATUS OF WOMEN, REPORT: CALIFORNIA WOMEN (1973), at 9.

woman's life is a man fully able to support her[35] —underlies and reinforces discrimination against women in all realms of their lives.

As the result of such stereotypes, statutory distinctions based upon sex-unique characteristics frequently bear no relation to a woman's ability to perform or contribute to society. (*See Frontiero,* 411 U.S. 677, 686.) To elaborate upon the examples previously cited, the teacher is put on mandatory maternity leave although she remains fit and able to teach;[36] the pregnant woman fully able to serve the goals of the military before and after the disability attendant upon delivery of her child is discharged although disabled men are given leaves of absence;[37] the involuntarily unemployed pregnant woman is denied benefits although her financial loss and suffering are indistinguishable from losses of other unemployed persons.[38] Thus, women are relegated to an inferior legal status without regard to their actual capacities, by ill-examined treatment of sex-unique characteristics. (*See*

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[35]The common stereotype that most women are supported by a male wage-earner and if they work at all, work only for "extras" for the family has no basis in reality. Two-thirds of all women work because of immediate economic need. Twenty-three percent are single, nineteen percent are divorced, separated or widowed. Twenty-two percent of women workers are married to men with incomes under $7200, the "modest adequacy" level established by the U.S. Department of Labor. Six percent have husbands earning less than the poverty level of $3000 per year. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WHY WOMEN WORK, (June 1973 (rev.)). *See also,* U.S. Rep. Martha Griffiths, *The Economics of Being Female,* 9 TRIAL 10, 17 (Nov.-Dec. 1973).

[36]*See* note 31 *supra.*

[37]*See* note 32 *supra.*

[38]*See Bowen v. Hackett,* 361 F.Supp. 854, 861 (D.R.I. 1973). *Cf.* Hanson v. Hutt, ___ Wash. ___, 517 P.2d 599 (1974).

Frontiero, 411 U.S. at 687.) Their earning power is diminished or terminated, benefits available to others similarly situated are denied them, and career goals and opportunities are thwarted.[39]

That the legislative process fails women when it deals with pregnancy is understandable. The process of birth, made mysterious in literature and folklore, can only be demystified through reference to the actual experience of women. But women are notably underrepresented among lawmakers, employers and judges.[40] In addition, the centrality of the childbearing function to society's view of women's proper role and place contributes to the survival of these myths, and makes this unique physical characteristic perhaps the most fertile ground for stereotype and misunderstanding and the last, most stubborn and intractable bastion of discrimination. For the reasons stated above, the historical pattern which finally necessitated the adoption of the *Reed* and *Frontiero* standard of scrutiny in the area of sex discrimination is precisely

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[39]E. Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480, 502 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7. HARV. CIV. RTS. & CIV. LIBS. L. REV. 260, 261-62 (1972); J. Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUPREME COURT REV. 157, 173-74 (1972).

[40]In *Frontiero*, this Court noted: "It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decision-making councils. There has never been a female President, nor a female member of the Court. Not a single woman presently sits in the United States Senate, and only fourteen women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. 411 U.S. 677, 686, at n.17.

what compels the application of that standard to sex-unique physical characteristics. To exempt pregnancy and other unique physical characteristics from that standard would be to erect an insuperable barrier to the legal equality of women.

Those who assert that discrimination based upon a unique physical characteristic is not sex discrimination often claim that the legislative history of the Equal Rights Amendment lends credence to their contention. Such assertions are based upon a misapprehension; the legislative history in fact rejects rather than adopts their position.

The most thorough exploration of the meaning and interpretation of the Equal Rights Amendment, which was praised by the principal proponents of the Amendment,[41] cited with approval in the Congressional reports[42] and referred to by its most vocal opponent, Senator Ervin, as the "primary legislative history" of the Amendment,[43] is the Yale Law Journal article written by Professor Thomas Emerson and three Yale law students.[44] The basic principle of the Equal Rights Amendment, as explained by the Emerson article and understood by the Amendment's proponents, is that sex is not a permissible factor for

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[41]118 Cong. Rec. S9083 (March 20, 1972). *See* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1536, n.19, 20 (1973).

[42]S. REP. No. 92-689, 92d Cong., 2d Sess. 11 (1972); H.R. REP. No. 92-359, 92d Cong., 1st Sess. 6 (1971).

[43]118 Cong. Rec. S9097 (March 20, 1972).

[44]Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971), [hereinafter cited as *Emerson article*].

determining the legal rights of women or of men.[45] Sex based classifications are prohibited; they are invalid *per se.* (*Compare McLaughlin v. Florida,* 379 U.S. 184, 189 (1964) (concurring opinion of Stewart, J.).) This standard, applied to legislation dealing with physical characteristics unique to either sex, would sometimes lead to illogical and absurd results: of necessity, only women are affected by a regulation permitting nursing mothers a three-month post-birth leave from work because of some health advantage thought to accrue to the child from nursing; only men are affected by a law concerning sperm bank donors. In such narrowly drawn laws, the unique characteristic is *necessary* to carry out the law's purpose and the purpose of the law can *only* be served by classifying on the basis of the unique characteristic.

Nonetheless, as the Emerson article points out, the individuals affected by such laws do obtain a benefit or are subject to a restriction because they are members of one or the other sex.[46] Emerson therefore recognized a "subsidiary principle" of the Equal Rights Amendment. Under this subsidiary principle, laws concerning physical characteristics unique to one sex would be subject to strict judicial scrutiny to insure the full equality of the sexes:

> The danger [that the basic principle of the Equal Rights Amendment would be undermined by permitting dual rights where unique characteristics are concerned] is increased by the possibility of

[45] *Emerson article, supra* note 44, at 880.
[46] *Emerson article, supra* note 44, at 880.

> evasion in the application of the subsidiary principle. Unless that principle is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights.[47] 80 YALE L.J. 871, 894.

Thus, under the Equal Rights Amendment, discrimination on the basis of a unique physical characteristic would be considered sex discrimination although the standard of review would, of necessity, be different than that applied to other sex-based classifications.

Patently, no "subsidiary principle" need be developed for unique physical characteristics of the sexes when the standard of review in sex discrimination cases is something less stringent than the total prohibition of sex-based classifications required by the Equal Rights Amendment. Neither the "scrutiny" of sex-based classifications challenged under the equal protection clause required by *Reed*[48] nor the strict scrutiny advocated by the plurality in *Frontiero*[49] would require the invalidation of laws based on a unique physical characteristic where the proper de-

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[47]*See also, Emerson article, supra* note 44, at 930.

[48]Reed v. Reed, 404 U.S. 71, 75 (1971).

[49]Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

gree of relationship between the classification and the purpose of the legislation was established.

Nor *should* a lower standard be created for classifications based upon sex-unique characteristics. As discussed above, pp. 35-38, the unique physical status of pregnancy is the central theme and rationale for the historic phenomenon of sex discrimination. The danger of isolating discrimination based on pregnancy from the general principle of sex equality is that that unique characteristic will become the pretext or subterfuge for governmental bias, the last resort of the notion that women are in "a class by themselves." (*Cf. Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971); Brown, *et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 894 (1971).) Therefore, considerations which require scrutiny of sex-based classifications also require that discrimination on the basis of unique physical characteristics be subject to the same scrutiny.

Only when classifications based on pregnancy are scrutinized as are other sex-based classifications can the stereotypes which have made women second class citizens be eliminated. The beneficial and even surprising results of discarding assumptions about the uniqueness of the trait in favor of assessing actual similarities and differences is illustrated in the following quotation from *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973):

> The heart of plaintiff's case is that disqualifying a physically capable woman from working be-

cause of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: a cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take a premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. *Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or gone unnoticed.*

473 F.2d 629, 634. (Emphasis added.)

The centrality of woman's biological reproductive role to historical and current discrimination against women on the basis of sex stereotypes leads to the inescapable conclusion: So long as classifications based upon unique physical characteristics are thrust outside the bounds of judicial scrutiny, so long will women suffer unwarranted and arbitrary discrimination because they are women.

II.

THE STANDARD OF REVIEW

This Court has traditionally employed a two-tier standard of review in equal protection cases. In cases involving suspect classifications, such as race,[50] national origin,[51] or alienage,[52] or touching upon fundamental interests, such as the right to travel[53] or the right to privacy,[54] the Court applies a strict standard of review, requiring the state to establish that the distinctions drawn by the law are necessary to further an overriding state interest.[55] In the area of economic and social legislation, the Court, investing legislation with a presumption of constitutionality, requires only that distinctions drawn by the challenged statute bear a rational relationship to a legitimate state purpose.[56]

While the two-tiered system of review undoubtedly has continuing vitality[57] it appears that the hard dichotomy between strict and minimal scrutiny is undergoing a perceptible softening at the "lower tier".[58] Particularly is this apparent in cases chal-

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[50] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

[51] *See, e.g.*, Oyama v. California, 332 U.S. 633, 644-646 (1948).

[52] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

[53] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1968); Dunn v. Blumstein, 405 U.S. 330 (1972).

[54] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1964).

[55] *See Developments In the Law—Equal Protection*, 82 HARV. L.REV. 1065, 1087-1131 (1969) (and cases cited therein).

[56] *Id.*

[57] *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973).

[58] Gunter, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L.REV. 1, 25-33 (1972).

lenging classifications based on gender, where this Court, in *Reed v. Reed,* stated that classifications based upon sex are subject to "scrutiny." 404 U.S. 71, 75 (1971). Thus, minimally, the standard of review in this sex discrimination case is that stated in *Reed*:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair* and *substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
>
> 404 U.S. 71, 76. (Emphasis added.)

However, for reasons more fully stated below, Appellees contend the statute challenged in this action should be subjected to strict scrutiny because the classification meets all of the Court's established criteria for "suspectness" and in addition impinges upon a fundamental right.

A. Sex-based classifications are constitutionally suspect.

Despite what appears in recent cases to be a re-examination of the rigid two-tier approach in equal protection cases, the criteria for designating certain classifications as "suspect" continues to inform the Court's decisions on which classifications should be subject to strict judicial scrutiny. Thus, in declining to subject classifications based on membership in a "poor" school district to the highest standard of review, Justice Powell in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973) applied those criteria as follows:

> The system of alleged discrimination and the class it defines have none of the traditional indicia

of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 411 U.S. 1, 28.

In contrast, a plurality of the Court applying those criteria to gender-based classifications, in *Frontiero v. Richardson,* 411 U.S. 677 (1973), concluded that such classifications should be treated as suspect:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." [citation omitted] And what differentiates sex from such nonsuspect statutes (sic) as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. 677, 686.

The plurality's holding coincides with a recent and growing recognition that gender discrimination is as pervasive and costly to society and its disadvantaged members as racial discrimination and requires the same affirmative and stringent measures to eradicate

it.[59] Thus, federal and state governments have added gender to statutes which originally prohibited only race discrimination.[60] Similarly, a number of state and federal courts have declared gender-based classifications suspect.[61]

Even as remedies for sex discrimination multiply, however, evidence of the intransigence of gender bias accumulates. For example, despite the Federal Equal Pay Act, 29 U.S.C. §206(d), passed in 1963, the pay

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[59]For example, in 1970, the Senate Committee on Labor and Public Welfare reported:

> Discrimination against women is generally practiced in a fashion far more overt, and with much less concern for either law or social niceties than is discrimination based on race.... This kind of blatantly disparate treatment is particularly obnoxious in view of the fact that while Title VII has been on the statute books for over five years, its proscription of sex discrimination continues to be widely regarded as a kind of legislative accident. S. Rep. No. 91-1137, 91st Cong., 2d Sess., 5, 6 (1970).

In 1971 the House Committee on Education and Labor, citing the failure of both judicial and EEOC efforts to eradicate sex discrimination, stated that:

> discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination [despite the fact that many believe sex discrimination to be] morally or physiologically justifiable. *H.R.* No. 92-238, 92d Cong., 2d Sess. 5 (1971).

[60]Ch. 1508, Stat. 1970, *amending* Cal. Labor Code §1412 (West 1973 Supp.); Ch. 397, Stat. 1965, *amending* Mass. G.L.A. Ch. 151B, §4 (1971); P.A. 1966, No. 349, *amending*, 20 Mich. C.L.A. §423.303a (1967); H.610, L.1973, *amending* Ohio Rev. Code §4112.02(A) (1973); P.L. 133, L.1969, *amending* 43 Pa. S. §955 (1964); Exec. Order No. 11375, 3 C.F.R. 320 (1967).

[61]*See, e.g.*, Ballard v. Laird, 360 F.Supp. 643 (C.D.Cal. 1973); Weisenfeld v. Secy. of H.E.W., ___ F.Supp. ___, 42 U.S.L.W. 2326 (Dec. 25, 1973) (D.C.N.J. 1973) (three-judge court); Thorn v. Richardson, ___ F.Supp. ___, 4 E.P.D. ¶7586, ¶7630 (W.D. Wash. 1971); Hanson v. Hutt, ___ Wash. ___, 517 P.2d 599 (1974); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1972).

gap between men and women has continued to widen,[62] and the percentage of women in certain professions has declined rather than increased.[63] Perhaps most significantly, sex bias remains a more reliable index of poverty than race bias.[64] At the same time, whole areas of social concern which were previously unscrutinized in terms of their impact on women have been revealed as discriminatory.[65]

The new national consciousness of the inequities women (and men) face because of their gender has resulted in an increasing number of legal challenges to discriminatory laws at all judicial levels. This

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[62]In 1966, women earned 63.3% of what men earned. By 1971, women earned only 59.5% of what men earned. U.S. Dept. of Labor, Women's Bureau, Economic Report of the President 104 (1973). When this is adjusted for differences in average full-time hours worked, the gap slightly decreases (from 65.9% in 1969 to 66.1% in 1971). *Id.* Even when adjusted, however, the clerical workers' gap increased from 70.0% in 1969 to 66.9% in 1971. *Id.* In 1970, clerical workers were 73.6% women. *Id.* at 157.

[63]*Id.* at 155-59 (*e.g.* architects, social scientists, authors, photographers); Carnegie Comm'n on Higher Education, Opportunities for Women in Higher Education 111 (1973) (professors).

[64]"Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is $7,396, of Negro men $4,777, of white women, $4,279, of Negro women $3,194. Women with college education, both white and Negro, earn less than Negro men with 8 years of education. Women head 1,723,000 impoverished families, Negro males head 820,000." A Matter of Simple Justice: The Report of the President's Task Force on Women's Rights and Responsibilities 18 (1970).

[65]*See, e.g.*, Note, *The Sexual Segregation of American Prisons*, 82 Yale L.J. 1229 (1973) (disparate treatment of women in prison); Note, *The Equal Rights Amendment and the Military*, 82 Yale L.J. 1533 (1973) (discrimination against women in the military); *Hearings Before the Joint Economic Committee*, 93d Cong., 1st Sess. (July 12, 1973) (discrimination against women in insurance).

Court, which since *Reed* has had the opportunity to review the problems of sex discrimination in several significant aspects,[66] is no longer dealing with a novel question, the dimensions and seriousness of which have not been brought before it.

For all these reasons, Appellees believe that the time is right for a decision that sex-based classifications should be held to be suspect and subject to strict judicial scrutiny. Appellees further contend that the instant case is a singularly appropriate one for such a holding. Because of the centrality of pregnancy and childbearing to the role concepts which have been the rationale for discrimination against women,[67] the decision to declare sex a suspect classification in this context would reach the root cause of classifications which were and are the result of stereotyped notions and generalizations about women. Such a holding would go far to ensure that legislative classifications could no longer be based on sex-role stereotypes or inalterable sex characteristics which bear no necessary relationship to an individual's need, ability or life situation.

B. Laws which burden the exercise of a fundamental right are subject to strict scrutiny.

This Court's opinion in *Cleveland Board of Education v. LaFleur, supra,* — U.S. —, 42 U.S.L.W. 4186

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[66]Frontiero v. Richardson, 411 U.S. 677 (1973); Shevin v. Kahn, No. 73-78, *probable juris. noted,* 42 U.S.L.W. 3246 (Oct. 23, 1973). *See also,* Cleveland Board of Education v. LaFleur, — U.S. —, 42 U.S.L.W. 4186 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

[67]See pp. 35-38, *supra.*

(1974) most recently declared that the decision whether or not to bear and beget a child is part of the fundamental right to privacy in matters of marriage and family life. *See also Roe v. Wade,* 410 U.S. 113 (1973); *Eisenetadt v. Baird,* 405 U.S. 438 (1972); *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1964); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923).

The strict scrutiny test is applicable not only where the denial of a fundamental right is absolute, but also where state regulation penalizes its free exercise. *See e.g., Memorial Hospital v. Maricopa County,* ___ U.S. ___, 42 U.S.L.W. 4277 (1974); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). Laws or regulations must not "needlessly, arbitrarily or capriciously impinge upon this vital area of a teacher's constitutional liberty." *Cleveland Board of Education v. LaFleur,* ___ U.S. ___, 42 U.S.L.W. 4186 (1974).

As in *LaFleur,* the law challenged in this case does not deprive a woman of her right to decide whether or not to bear a child. It does, however, penalize and burden her exercise of that right. Unlike *any other* disabled worker in the State of California covered by the state disability insurance program, the woman who suffers a disability in connection with her pregnancy is left to bear the economic consequences of her inability to work. As a result of her pregnancy, a woman faces medical bills, the possible cost of temporary help and, if her pregnancy is successfully concluded, a new child to support at the very time she

is unable to bring home wages to pay for these expenses. Since more than half of the wives in the labor force work because of absolute economic necessity,[68] the loss of salary is as devastating for them as for any other disabled worker. The denial of benefits available to other workers therefore constitutes a substantial burden upon her exercise of her right to bear a child and the State must demonstrate a compelling interest in its classification.[69]

III

APPELLANT'S EXCLUSION OF DISABILITIES CAUSED BY PREGNANCY AND CHILDBIRTH IS NOT NECESSARY TO THE REALIZATION OF A COMPELLING STATE INTEREST AND HAS NO FAIR OR SUBSTANTIAL RELATION TO THE OBJECTIVE OF CALIFORNIA'S DISABILITY INSURANCE PROGRAM.

A. The objective of the California disability insurance program is to compensate for economic burdens caused by disability of any type.

Section 2601 of the Unemployment Insurance Code sets forth the Legislature's intent in enacting the disability insurance program:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce

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[68] In March 1967, 61.3% of the wives in the labor force had husbands who earned less than $7000 per year, characterized by the U.S. Department of Labor as the minimum level of modest adequacy. U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS, WOMEN'S BUREAU BULLETIN 294, at 34.

[69] Ironically, the Appellant also denies benefits to women disabled because of an abortion. Thus women are penalized both for choosing to bear a child and for choosing not to bear a child.

> to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

As discussed pp. 9-24, *supra*, the Legislature has made California's one of the most liberal of all such programs by pooling all risks in one fund, extending coverage to persons having a tenuous relationship to the labor force (including the deceased), granting proportionally greater benefits to more poorly paid workers, and compensating virtually all disabling conditions regardless of cause.

Appellant now seeks to bootstrap his principal justification of the discriminatory exclusion challenged herein—that it costs too much to extend benefits on a nondiscriminatory basis—into a justification based on some asserted central legislative intent to hold costs to a minimum, especially within the limits of an allegedly hallowed one percent contribution rate. Finally, Appellant asserts that the "legislative objective" was *not* to grant the benefits at issue in this action, an intention made obvious by the statute itself but of questionable relevance to the relation of the exclusion to the objectives of the entire program.

That the Legislature intended for the program to be self-sustaining is rather obvious. The relevance of such a statement is dubious, however. First, even Appellant does not contend that granting women benefits for disabilities caused by pregnancy or parturition would threaten the self-sustaining nature of the

fund.[70] Rather, the question is one of the Legislature's readiness to increase program resources. In the past the Legislature has been ever ready to do so.[71] Second, assuming that financing of the program were threatened, which it is not, it is difficult to construe the Legislature's *procedure* for financing the program on the same level as the legislative purpose of the program as stated in the enabling legislation. *Cf. United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973); *Cleveland Board of Education v. LaFleur,* ___ U.S. ___, 42 U.S.L.W. 4186 (1974). Similarly, the fact that a one percent contribution rate has usually been used to finance the fund does not enshrine the rate itself as a substantive objective of the Legislature.[72] Moreover, there is no evidence that the one percent contribution rate could not be maintained

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[70]CAL. UNEMP. INS. CODE §2604 empowers the director to modify the duration or level of benefits in an emergency in order to protect the solvency of the fund pending action by the Legislature.

[71]The Legislature transferred $70 million into the fund in 1961 from the Unemployment Insurance Fund. CAL. UNEMP. INS. CODE §3006. This sum represented about one-half of sums collected from employees during 1944 and 1945 for the Unemployment Fund. Milliman and Robertson, Inc., *supra* note 6, at 3. Apparently another $70 million potentially available for the Disability Insurance Fund still lies in the Unemployment Fund. The Legislature has also raised the taxable income limit several times (CAL. UNEMP. INS. CODE §985) in order to increase program funds.

[72]The fact that the taxable income limit has been raised instead of the rate is consistent with the statutory scheme of paying proportionally more to lower paid workers. The taxable income limit itself is a regressive feature of the act; raising the limit instead of the rate makes it somewhat less regressive. The rate has been raised once for all workers: to 1.1% for six months in 1965. See Appellant's Br. at 14, n.10. A rate of 1.25% has always been charged for self-employed individuals who choose to be covered by

were Appellant to grant the benefits claimed in this action.[73]

Appellant also declares that a central purpose of the California program is *not* to grant benefits such as those requested in this action. It is presumed the Legislature intended its statute to operate as it does. But such a purpose would not validate the exclusion any more than Illinois' intent to exclude unwed fathers from guardianship of their children or Idaho's intent to exclude all women from estate administration could validate statutes whose constitutionality was questioned in this Court. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Reed v. Reed,* 404 U.S. 71 (1971). Moreover, to the extent that the motives of the Governor or the Legislature are relevant to legislative intent as expressed in the statute (*cf. Palmer v. Thompson,* 403 U.S. 217 (1971)), a review of the history cited by Appellant reveals that the Legislature most desired to exclude benefits for child *rearing,* not child *bearing.*[74] To the extent that such a concern

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the program. CAL. UNEMP. INS. CODE §984. The Legislature also took the unusual step of requiring the director to report to the Legislature and Governor "at once" whenever he believes that a "change of contributions rate . . . may become necessary. . . ." CAL. UNEMP. INS. CODE §2604.

[73]Appellant has not furnished any data to the court below or to this Court stating the amount of money that would be forthcoming were the taxable income limit raised or eliminated. As discussed *infra,* Appellant's cost estimate for granting benefits is greatly inflated.

[74]Rhode Island at first compensated women not only for medical disabilities suffered in pregnancy and parturition, but also, on an unquestioning basis, for child *rearing* leave subsequent to the end of medical disability. See E. Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits,* 17 N.Y.L. FORUM 480, 484-85 (1971). The concern about "maternity benefits" and its confusion with disability benefits also appears in Rentzer v. Cal. Unemp. Ins.

might be legitimate, the exclusion of Section 2626 is simply arbitrarily overbroad, for Appellant himself admits the distinguishability between leaves for child rearing and disabilities caused by child bearing. Appellant's Brief at 20.

Appellant's set of objectives is really only one, as expressed in Section 2601 and as interpreted by the pooled risk coverage extended to all types of workers for all types of disabilities. As the District Court below noted, with reference to the compensatory purpose expressed in Section 2601:

> Clearly the exclusion of pregnancy-related disabilities does not promote this purpose; the economic hardship pregnant women suffer when they cannot work is identical to the hardship of other disabled workers. 359 F.Supp 792, 797.

B. Disabilities caused by pregnancy and childbirth are similar in all relevant respects to disabilities now compensated.

Pregnancy and childbirth are biological processes accorded great value in any society because they are necessary to the survival of humanity. So infused have these temporary biological states become with talismanic mystery and veneration that we at times lose sight of the fact that very ordinary injuries to the

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App. Bd., 32 Cal. App. 3d 604, 606 (1973), cited in Appellant's Brief, p. 7. Rentzer has no relevance here. The question presented was limited, the court's reasoning was questionable, its decision became final after the District Court's decision herein, and its holding has been rendered moot by enactment of § 2626.2. (Appellees' Memo. in Opp. to Motion to Reconsider (July 9, 1973).) In any event, the exclusion of pregnancy-related disabilities was not the only and perhaps not even the major money-saving "difference" between the Rhode Island and California programs. See SINAI, FOR THE DISABLED SICK: DISABILITY COMPENSATION (U. Mich. School of Pub. Health 1949 at 35-41, 65-66).

body occur as a result of childbirth, injuries similar to those now compensated under the California disability insurance program. Appellant seeks to distinguish coverage of such disabilities by asserting that (1) "pregnancy" is neither illness nor injury, (2) disabilities resulting from pregnancy and childbirth are distinguishable in some other relevant respect from disabilities now covered by the California program, and (3) labor force participation patterns of mothers of very young children justify such differential treatment. These contentions are devoid of merit.

1. Disabilities resulting from pregnancy and childbirth are not medically distinguishable from disabilities now covered by the California program.

On March 2, 1974, the American College of Obstetricians and Gynecologists adopted the following Policy Statement on Pregnancy-Related Disabilities:

> Pregnancy is a physiological process. All pregnant patients, however, have a variable degree of disability on an individual basis, as indicated below, during which time they are unable to perform their usual activities. (1) In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the peurperium. The process of labor and peurperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks. (2) Complications of a pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy and abortion. (3) A woman with preexisting disease which in itself is not disabling, may become dis-

abled with the addition of pregnancy. Certain patients with heart disease, diabetes, hypertensive cardiovascular disease, renal disease, and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.

The onset, termination and cause of the disability, related to pregnancy, can only be determined by a physician.

By far the preponderance of disability days resulting from pregnancy and parturition, in the absence of complications, are due to the birth of the child. The Biblical recognition that "in pain thou shalt bring forth children" (Genesis 3:16) may have been modified by modern natural childbirth methods and anesthesia which reduce pain caused by tension and anxiety, but the fact that injury is sustained by various parts of a woman's body is confirmed by common medical knowledge.[75]

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[75] *See* H. AVNET, PHYSICIAN SERVICE PATTERNS AND ILLNESS RATES (1967) listing in a section devoted to "Morbidity Studies" (pp. 265-346) tables which include under the heading *illness*, deliveries and complications of pregnancy, childbirth and puerperium, pp. 276, 281, 283, 293, 296, 301, 308, 320, and indicate the number of days in hospital, incidence as compared with other disabilities, and comparative utilization of physician services. Table 127 on p. 273, headed "Selected Incidence Rates," shows "Normal Delivery" nineteenth in the list. In the chart headed "Incidence of Attended Illness by Diagnostic Category" there are 22 diagnostic categories in descending order of frequency with "Deliveries and Complications of Pregnancy, Childbirth and Puerperium" the 17th listed. Table 162 on page 428 shows the average length of days' stay in hospital with 4.4 for deliveries and complications of pregnancy, childbirth and puerperium. The average for diseases of the circulatory system is 12, for diseases of bones and organs of movement, 10.1, for diseases of male genital organs, 8 days.

Virtually the entire reproductive tract of a woman is injured to some extent during childbirth.[76] The uterus, cervix, birth canal, vulva and perineum are all affected. "Normal" parturition also frequently involves injuries to the urinary tract and other changes affecting a woman's mental and physical health.

Perhaps the most graphic illustration of injury attendant upon normal birth, however, is the surgical incision called an episiotomy. An episiotomy is the incision made in the perineum—the area between the posterior opening of the vagina and the rectum—in order to expand the vaginal opening to facilitate birth.[77] Episiotomies are now performed in an overwhelming majority of deliveries. "Except for cutting

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[76]See text discussion, *infra*. Appellant presented no evidence whatsoever to the contrary before the District Court, and never argued that childbirth is not accompanied by attendant injury to the female body. Appellant seeks to raise this factual issue for the first time before this Court, relying solely on one deposition from an action not before this Court and one article regarding the sociological status of pregnant (not puerperal) women.

[77]Episiotomies are performed routinely to avoid the substantial danger of a jagged and uncontrolled perineal tear, resulting in a wound that is larger, slower to heal, and more difficult to repair surgically. R. DOUGLAS AND W. STROMME, OPERATIVE OBSTETRICS 505 (2d ed. 1965). "In about one-half of all primiparae, the laceration [without episiotomy] is rather extensive." BECK, OBSTETRICAL PRACTICE 962 (6th ed. 1955). *See also* EASTMAN AND HELLMAN, WILLIAMS OBSTETRICS 399 (13th ed. 1966). So great is the pressure on the perineum that one study found significant perinneal lacerations in over one of five women having their first child even with an episiotomy. Harris, *An Evaluation of the Median Episiotomy*, 106 AM. J. OF OBS. AND GYN. 660, 664-65 (1970). That extensive lacerations occur in over 20 percent of episiotomized primagravidas as part of "normal" birth, attests to the broad use of the word "normal" in this context. See note 20, *supra*.

and tying the umbilical cord, episiotomy is the most common operation in obstetrics."[78]

In a normal birth, the uterus contracts to expel the foetus through the birth canal. The placenta, which is attached to an internal layer of the uterus cannot contract, and is gradually sheared off.[79] The resulting state of the uterine wall has been described as a great "wound area".[80] Although excessive blood loss from uterine hemorrhage is a complication of birth, the fatal risk of such hemorrhage is one of the primary concerns of the puerperium, and requires most women to restrict their physical activity for a period following birth.[81] During puerperium, the uterus continues

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[78]EASTMAN and HELLMAN, *supra* note 77, at 433. For incidence of episiotomy, see DOUGLAS AND STROMME, *supra* note 77, at 504 (79.3% of all authors' patients); LAW, Standards of Obstetric Care: The Report of the Northwestern Metropolitan Regional Obstetric Survey, 1962-1964 (1967) at 59 (between 85 and 90% of all primiparae).

[79]J. WILLSON, C. BEECHAM, AND E. CARRINGTON, OBSTETRICS & GYNECOLOGY 423 (2d ed. 1963); GUYTON, TEXTBOOK ON MEDICAL PHYSIOLOGY 987 (4th ed. 1971).

[80]Separation of the placenta "creates a wound area that extends over the entire inner surface of the uterus". DAVIS, ed., 1 GYNECOLOGY AND OBSTETRICS 7 (rev. ed. 1972). "The branches of the uterine arteries . . . eventually open into the large sinuses in the decidua basalis at the placental site. The source of the blood loss after delivery, except that due to soft tissue injury, is the sinuses which are left open by separation of the placenta. Excess bleeding is prevented by firm contraction of the uterine muscle bundles . . . . This is followed by clot formation and retraction, the usual method by which bleeding from open vessels is controlled." WILLSON, *et al.*, *supra* note 79, at 423.

[81]"For the mother the third stage is the most dangerous part of the entire labor because abnormalities in separation and expulsion of the placenta may be accompanied by profuse bleeding. The total maternal mortality from hemorrhage is not always obvious because excessive bleeding may cause death by reducing the patient's ability to cope with other complications. [Citing studies]." *Id.* at 421. It has therefore been recommended that the

to contract to its former size, causing acute pain for many women from recurring contractions lasting up to a minute during the first few days of this period.[82]

As the child passes from the uterus, through the cervix, down the vagina, and out the vulva (vaginal opening), its progress results in other injuries. "[S]ome degree of injury to the cervix is invariably the rule,"[83] with lacerations, edema, and hemorrhage being regarded as unavoidable.[84] In the vagina itself, "[s]ome damage to the soft tissue structures of the birth canal occurs during every delivery."[85] Although severe vaginal lacerations are rare, even a fatal vaginal laceration has been said to occur during *normal* birth.[86] Finally, as the child emerges, the vulva is

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woman should not go up and down stairs for a week, and should limit her activity for a week or two. *Id.* at 574. Amicus Curiae National Association of Manufacturers quotes Dr. John C. Donovan as testifying that for ten to twelve days after delivery there is enough risk of uterine hemorrhage, along with other medical illness or injury, to justify a conclusion that the woman is "at risk," or clinically disabled. See Brief of National Association of Manufacturers as Amicus Curiae at 8-9.

[82]WILLSON, *et al.*, *supra* note 79, at 573; A. GUTTMACHER, PREGNANCY, BIRTH AND FAMILY PLANNING 241 (1973). Such puerperal contractions are found especially in multigravidas. *Id.*

[83]DOUGLAS AND STROMME, *supra* note 77, at 527; *see also* EASTMAN and HELLMAN, *supra* note 77, at 921.

[84]"Microscopically, the cervix immediately after delivery, is the seat of such marked edema, congestion and hemorrhage that its usual constituents cannot be easily distinguished. Within a few days, this picture disappears, and regeneration of the muscle and connective tissue follow." BECK, *supra* note 77, at 384. Beck regards laceration as inevitable in primiparous women (*id.* at 961). *See also,* KERR AND MOIR, OPERATIVE OBSTETRICS 842 (5th ed. 1950).

[85]WILLSON, *et al.*, *supra* note 79, at 535. Vaginal soft tissue damage is more pronounced in primagravidas. *Id.*

[86]Jewett, *Fatal Laceration from Normal Birth*, 287 N. ENG. J. OF MED. 44 (1972). Severe vaginal lacerations have been said to have an incidence of from 3.2% to 6.2%. Law, *supra* note 78, at 60.

traumatized and "should be regarded as an open wound during the early days of the puerperium, and every precaution should be taken to protect against its infection."[87]

These injuries to tissues and organs concerned with reproduction are all part of "normal" parturition. All of them involve physiologic states which are abnormal states necessarily connected with "normal" parturition.[88] It is no wonder that maternal mortality rates are a measure of a nation's advances in health care.[89]

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[87]BECK, *supra* note 77, at 388; *see also* EASTMAN AND HELLMAN, *supra* note 77, at 433.

[88]For instance, "[T]he pressure of the pregnant uterus and its intra-abdominal displacement effects, together with the action of sex hormones, leads to dilation and partial dysfunction of the renal pelvis, uretic and urinary bladder. . . . The urinary bladder also frequently is traumatized during delivery, whereupon it becomes edematous and hyperemic." DAVIS, *supra* note 80, at 11. There may also be submucosal hemorrhage of the bladder from the trauma of delivery. WILSON, *et al.*, *supra* note 79, at 568. Excess fluid is eliminated through a marked diuresis beginning within one to two days after delivery, but "the patient may have difficulty in voiding because of perineal pain or local edema from trauma." *Id.* at 571; *see also* EASTMAN AND HELLMAN, *supra* note 77, at 479.

Other marked changes take place regarding blood. In a normal delivery, the woman losses 500 ml. (1 pint) of blood. Moreover, the "fibrinolytic system [involving blood clotting] is profoundly activated in the first few hours after delivery and gradually falls to normal nonpregnant values by the fourth day postpartum. . . . Stress, both physical and emotional, is known to be associated with activation of the fibrinolytic system". Manning, *et al.*, *The Fibrinolytic System in Late Pregnancy, Labor and the Early Puerperium*, 110 AM. J. OF OBS. AND GYN. 900, 904-05 (1971). Postpartum involution of the pituitary (the anterior lobe of which has almost doubled during pregnancy), and sudden decreases in production of thyroid and other hormones are also held responsible for psychological malaise in the first four days or so of the puerperium. BAKER, PSYCHIATRIC DISORDERS IN OBSTETRICS 34 (1967); EASTMAN AND HELLMAN, *supra* note 77 at 349, citing HAMILTON, POSTPARTUM PSYCHIATRIC PROBLEMS (1962).

[89]The maternal mortality rate in the United States for 1968, 1969, and 1970, respectively, was 24.5, 27.5, and 24.7 deaths per

The fact that these bodily injuries or abnormal physiologic states occur during parturition and the puerperium does not mean that all women will be *disabled* for the same amount of time, but rather that disabilities which *do* result are rooted in real injuries and illnesses which are neither statistically "normal" nor desirable physiologic states for the affected body. Society's congratulatory response to a woman during the puerperium has little relevance to the simple fact that she has usually experienced physical trauma and is almost always disabled from working for some period of time.[90] Were these injuries to reproductive and genital tissues to occur to a male, or to a woman apart from parturition, the disabilities resulting therefrom would unquestionably be compensable under Califor-

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100,000 live births. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1972, at 57. Maternal mortality is still among the leading causes of death for American women of childbearing age. Hern, *Is Pregnancy Really Normal?*, 3 FAMILY PLANNING PERSPECTIVES 5, 8 (1971).

[90]Appellant puts great stock in the fact that pregnant women are not treated as if they are sick by society. Appellant's Br. at 18-19, citing McKinlay, *The Sick Role—Illness and Pregnancy*, 6 Soc. Sc. AND MED. 561, 568-71 (1972). The obvious answer is that pregnant women are not treated as if they were disabled because they are not; women recuperating from childbirth *are* treated as ill or injured, again because they are. Pregnancy may be necessary for survival of the species, but parturition jeopardizes individual health, as maternal mortality and morbidity rates make clear. Moreover, a pregnant woman does not have to "get well," but the ill and the postparturient must limit their activity until they do so. Motivation to recover may be crucial to the duration of recovery for a postpartum woman, *e.g.*, motivation to perform pelvic exercises which strengthen the abdominal muscles. (*See* WILLSON, *et al.*, *supra* note 79, at 572-73.)

nia's disability insurance program. If pregnancy-caused and parturition-caused disabilities are to be distinguished from disabilities now compensated by the California program, it cannot be on the grounds that these disabilities are not caused by injury or illness.

The District Court concluded that "the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." 359 F.Supp. 792, 797. Its factual holding is in accord not only with medical fact but also with courts which have passed on the question. *See, e.g., Green v. Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973); *Heath v. Westerville Board of Education,* 345 F.Supp. 501, 506 (S.D. Ohio 1972); *Wetzel v. Liberty Mutual Ins. Co.,* — F. Supp. —, 7 E.P.D. ¶9097 (W.D. Pa. 1974); *Dessenberg v. American Metal Forming Co.,* Civ. Action No. C-72-48T (N.D. Ohio, Oct. 3, 1973). *Cf. Cleveland Board of Education v. LaFleur,* — U.S. —, 42 U.S.L.W. 4186, 4190 (1974).[91]

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[91] A New York teacher won reinstatement to her job under a provision prohibiting discharge for absence due to temporary illness, the Court stating: "It is pure sophistry to argue . . . that maternity is an indication of health, and therefore cannot be said to cause 'serious personal illness'." People ex rel. Peixotto v. Board of Education, 82 Misc. 684, 692, 144 NYS 87 (Sup. Ct. 1913). Accord, Cerra v. East Stroudsburg Area Sch. Dist., 299 A.2d 277 (Pa. 1973).

Judge Cayton, retired Chief Judge of the District of Columbia Court of Appeals, arbitrating an employee grievance for sickness and accident benefits due to normal childbirth, awarded benefits,

Appellant's admission that women are disabled for a short period after childbirth, coupled with his unwillingness to distinguish between this disability and maternity leave, strikingly pinpoints the sex stereotyping involved in this case.[92] In this state program,

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stating: "The contract section neither includes nor excludes maternity conditions. But it is fair to say that the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of 'sickness benefits' and 'absence due to illness' and there is no reason in logic or fairness to hold that there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employee's constitution. . . . I am satisfied it is . . . accurate to say that pregnancy is a physiological condition, involving substantial changes in various organs of the mother's body. We may properly take 'judicial notice' . . . that labor and confinement result in some amount of trauma and debilitation. Such was the situation here. . . . In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalescence; and after an absence of six weeks she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, what she suffered was clearly much more than a mere trifling or passing indisposition; it was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to the sickness benefits above described." Washington Publishers Assn., 39 L.A. 159, 160 (1962).

[92]Appellant states that "it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth. . . ." (Appellant's Br. at 20.) Similarly, an amicus paradoxically emphasizes the fact that the Department of Health, Education, and Welfare considers the two weeks following delivery to be an illness, but not subsequent periods. (American Telephone and Telegraph Co., as Amicus Curiae, at 11-12, note 25.) Another amicus ironically stresses medical testimony that all women are "at risk" for ten to twelve days following delivery, with longer periods necessary for some individuals but more often due to sociological causes. (National Association of Manufacturers as Amicus Curiae, at 8-9.)

as in society itself, the joys and blessings of motherhood are touted while the physical traumas of childbirth are studiously overlooked. Yet childbirth is both a blessing and a burden. To recognize that childbirth gives rise to verifiable physiological injuries is not to demean its real and substantial benefits, but for the state to recognize only the benefits for purposes of its disability laws is to resort to a pleasant mythology in the face of medical fact.

2. Disabilities resulting from pregnancy and childbirth are not distinguishable in any other relevant respect from disabilities now covered by the California program.

Appellant contends that the exclusion of disabilities caused by pregnancy and childbirth from program coverage is justified on the theory that such disabilities may be said to be "voluntary," "predictable," or "normal." As Appellees have previously discussed, however, pp. 20-24, *supra,* the program now covers all disabilities without regard to whether they are in some sense "voluntary," "predictable," or "normal." Even if it were true, therefore, that all pregnancies and births were normal and voluntary, and that the disabilities resulting therefrom could also be said to be normal and voluntary, exclusion from coverage under California's program would not be justified.

Appellees have previously noted the problems of defining what is voluntary, note 19 *supra.* But in any common sense use of the word, it cannot seriously be contended that all pregnancies are voluntary. *Cf. Roe v. Wade,* 410 U.S. 113 (1973). Contraceptives are

not infallible.[93] Nor are they acceptable as a means of birth control to a substantial percentage of the population, who may nevertheless wish to avoid having more children. The number of unwanted pregnancies that are not aborted for reasons of health, philosophy, or religion is unknown, but to characterize such unwanted births as "voluntary" requires a special use

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[93]None of the contraceptive devices currently in use are 100 percent effective. Three out of 1000 condoms are defective upon receipt from the manufacturer and one out of 300 break or tear in use. Two to three percent per year of women using a diaphragm at all times during intercourse become pregnant. One-tenth of one percent per year of women using a combined oral contraceptive become pregnant and five-tenths of one percent of those using a sequential contraceptive become pregnant. One and one-half percent to three percent of all women using an intra-uterine device become pregnant during the first year of use. S. J. Segal, *Contraceptive Technology*, REP. ON POPUL. & FAM. PLAN. 1 (Oct. 1969); *Id.* (July 1971).

Also, many women cannot or will not use various contraceptive methods because of their possible side effects. Possible side effects of oral contraceptives include changes in carbohydrate metabolism, blood pressure, adrenal function, nervous system function and liver function. Oral contraceptives can cause nausea, dizziness, thrombosis, pulmonary embolism, idiopathic thromboembolic disease, candida albicans, benign hepatoma, amenorrhoea, chorea, and chloasma. I.U.D.'s can cause bleeding, pain, infections and perforation of the uterus. Also many are expelled automatically from the woman's uterus. S. N. Preston, *The Oral Contraceptive Controversy*, 111 AM. J. OBS. AND GYN. 994 (1971); S. J. Segal, *supra*; L. Poller, *et al.*, *Oestrogen-Progestogen Oral Contraception and Blood Clotting: A Long Term Follow Up*, 4 BRIT.MED.J. 648 (1971); D. Riddock, *et al.*, *Chorea and The Oral Contraceptive*, *Id.* at 217; *Amenorrhea After The Pill*, *Id.* at 510; H. J. Tatum, *Intrauterine Contraception*, 112 AM. J. OBS. AND GYN. 1000 (1972); P. E. Sartwell, *et al.*, *Thromboembolism and Oral Contraceptives: An Epidemiologic Case-Control Study*, 90 AM. J. EPIDEM. 365 (1969); W. G. Povey, *Intrauterine Contraception: An Overview*, 51 POSTGRAD. MED. 221 (1972); J. K. Baum, *et al.*, *Possible Association Between Benign Hepatomas and Oral Contraceptives*, LANCET 926 (Oct. 1973); D. Catterall, *Candida Albicans and the Contraceptive Pill*, LANCET 830 (Oct. 1966).

of the word.[94] It should be noted that disabilities resulting from "voluntary" abortions, however minimal the disability may be, are not compensable under the old or new version of Section 2626. Appellees willingly concede—more as a matter of optimistic faith than researched fact—that most births in this country are desired. But Appellant may not conclusively presume that all births or all pregnancies are voluntary. *Cf. Schlesinger v. Wisconsin,* 270 U.S. 230 (1926) (conclusive presumption that gift made within six years of death was made in contemplation of death); *Stanley v. Illinois,* 405 U.S. 645, 654 (1972) (possible fact that "most unmarried fathers are unsuitable and neglectful parents" would not entitle state to deprive individual father from hearing re custody of his child).

Appellant now covers other disabilities resulting from "normal biological functions," such as disabilities resulting from orthodontic treatment, sex change operations, or those for hair transplants to eliminate baldness or plastic surgery to change the shape of the nose. The fact that pregnancy is a normal biological function is therefore irrelevant to coverage under the California program. It strains coherence, however, to

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[94]To deny benefits to a woman who refused to obtain an abortion for religious reasons would present severe constitutional problems under the First Amendment. Also, many women are fearful of obtaining an abortion to terminate a "voluntary" pregnancy because complications can arise. Abortion can cause infection, hemorrhage, renal failure, bacterial shock, and even death. EASTMAN AND HELLMAN, *supra,* note 77, at 530. In New York in 1970, 8.1 percent of all abortions had complications arise. U.S. DEP'T OF HEW, PUBLIC HEALTH SERVICE, THE EFFECT OF CHANGES IN THE STATE ABORTION LAWS 27 (1971).

refer to most of the trauma suffered in childbirth as "normal" except in the statistical sense. It is also statistically normal to get two colds per year, but both the injuries suffered in childbirth and respiratory ailments are deleterious to health and therefore not "normal" from a viewpoint of health. See note 20, *supra*.

3. Labor force participation patterns of mothers of young children cannot justify differential treatment of disabilities caused by pregnancy and parturition.

Appellant contends that the exclusion of disabilities caused by pregnancy and childbirth from program coverage is justified because 50% of the working women who give birth do not return to work within the next year following delivery. As Appellees have previously discussed, however (pp. 13-18, *supra*) the program now covers all disabilities without regard to the disabled individual's present or likely future labor force status. Payments for the deceased, to the unemployed disabled, and the aged, coupled with the favored benefit status given part-time workers, illustrate California's lack of concern for future connection to the labor force or return to one's old job, a disregard that may distinguish the California program from employer-financed programs. In any event, mothers of young children who do leave the labor force, do not do so permanently, but instead only interrupt their labor force participation.

A substantial number of women with very young children participate in the labor force. Of women with children under the age of three years, 41.9% had

some labor force experience during 1969.[95] About 27% of all women with children under three years old hold fulltime jobs, as compared with almost twice that percentage for all women between the ages of 18 and 64.[96] What the statistics show is that many women do leave the labor force for a few years, but that they return by the time their children enter school.[97] As the Department of Labor concluded: "A very small proportion of women leave the labor force permanently at this time." *Women's Bureau, Dep't of Labor, Women Workers Today* 4 (1972).

That fully half the women who give birth return almost immediately to the labor force is a startling development itself and may represent a trend toward

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[95]Waldman and Gover, *Children of Women in the Labor Force*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., Table 2, at 21 (July, 1971).

[96]In 1969, almost two-thirds (66.3%) of the 41.9% of the women with children under three years old were working fulltime, *i.e.*, 27% of all women with children under three years old. *Id.* at Table 2, at 21.

In September, 1973, 52.3% of all women between 18-64 years old were in the labor force, as compared to 51.1% of women in September, 1972. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE (Nov. 1973).

[97]In 1972, 26.9 percent of the mothers with children under three years old were in the labor force; 36.1 percent of mothers with children three-five years old worked; 50.2 percent of women with children 6-17 years old were in the labor force. Hayghe, *Labor Force Activity of Married Women*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., Table 4, at 34 (April, 1973).

See also, Waldman and Gover, *supra* note 95, at 19; SPECIAL LABOR FORCE REPORT SUMMARY OF THE DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MARITAL AND FAMILY CHARACTERISTICS OF WORKERS (Sept. 1971). It should be noted that the labor participation rate of women with children under six years old was 38% when a female relative over eighteen was present in the household (as compared to the 30% participation rate when no such person was present) indicating the need for child care services for working women. Waldman and Gover, *supra* note 95, at 24.

even greater participation in the near future. Far fewer women with young children worked even five to ten years ago.[98] More women work today than ever before, and increased labor force participation is even more marked among women with young children.

These changes in labor force participation have not yet changed the stereotypes that employers may have regarding female employee absenteeism and turnover rates,[99] and may result in discrimination against women who remain in the work force. As the *Eco-*

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[98]The trend for more women with young children to work is evident from the following statistics: From 1950-1971, the labor force participation rate for women with children under six years old increased from 12 to 30 percent. DEP'T OF LABOR, WOMEN'S BUREAU, ECONOMIC REP. OF THE PRESIDENT 93 (1973). In 1960, 18.6% of married women with children under six years old were in the labor force; in 1965, 23.3% were working; in 1972, 30.1% of married women with preschool children were in the labor force. MARITAL AND FAMILY CHARACTERISTICS OF WORKERS, *supra* note 97. Among married women aged 20-24 years old with children under six, there was an increase of 325,000 workers (82% increase in labor force participation rate) from March, 1966 to 1972: for married women 25-34 years old with children under six years old, there was an increase of 372,000 workers in the same period (98% labor force participation rate increase). Hayghe, *supra* note 97, Table 3, at 34.

In 1970, in California, 31% of the mothers with pre-school children were in the labor force.

[99]During the 1960's, the turnover rate among women altered and women employees no longer increase the level of total quits. Armknecht and Early, ***Quits in Manufacturing: A Study of Their Causes***, U.S. DEP'T OF LABOR, MONTHLY LABOR REV. 31-37 (Nov. 1972). In a more recent study on women's quitting rates. Armknecht and Early again concluded, "Over the last 14 years their upward pressure on quits has been reversed and now they exhibit lower than average propensities to quit." Armknecht and Early, ***Manufacturing Quit Rates Revisited: Secular Changes and Women's Quits***, U.S. DEP'T OF LABOR, MONTHLY LABOR REV. 58 (Dec. 1973).

This trend was already noticeable in 1968 where, in examining factory workers, the available statistics indicated the net differences in job-leaving of men and women were small: 4.4 (men)

nomic Report of the President, 1973 comments (at 106):

> There is clearly prejudice against women engaging in particular activities. . . . Employers also may have formulated discriminatory attitudes about women, exaggerating the risk of job instability or client acceptance and therefore excluding women from on-the-job training which would advance their careers.
>
> In fact, even if employers do estimate correctly the average job turnover of women, women who are strongly committed to their jobs may suffer from "statistical discrimination" by being treated as though their own behavior resembled the average . . .

Appellant has miscalculated the effect of childbirth on labor force participation by failing to consider current trends toward continued participation immediately following childbirth and by failing to consider the fact that women who do leave for a few years return to the labor force.

More importantly, however, Appellant is constitutionally prohibited from discriminating against the entire plaintiff class on the basis of the characteristics of half of them. Even if 50% of all women giving birth left the labor force permanently, and even if future labor force participation were relevant to eligibility for benefits in California, Appellant would

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to 5.2 (women) separations. Separations included quits, layoffs, and other involuntary separations. The gap was already lower than in a previous study done in 1955. WAGE AND LABOR STANDARDS ADMINISTRATION, DEP'T OF LABOR, FACTS ABOUT WOMEN'S ABSENTEEISM AND LABOR TURNOVER 2 (Aug. 1969).

still be prohibited from excluding all birth-caused disabilities from coverage on the basis of a conclusive presumption that women who give birth will not return to work.

This Court has invalidated statutory classifications bottomed in such conclusive presumptions. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Cleveland Board of Education v. LaFleur,* 42 U.S.L.W. 4186 (1974); *Vlandis v. Kline,* 412 U.S. 441 (1973); *Carrington v. Rash,* 380 U.S. 89 (1965); see also *Reed v. Reed,* 404 U.S. 71 (1971). Conclusive presumptions which act to deny an individual the right to controvert the exclusionary presumption, and which therefore deny an individual substantial rights, have been invalidated even where the presumption was assumed to be correct in the vast majority of cases. Thus in *Stanley* it was assumed that most unwed fathers might be unfit parents; in *Carrington* it was assumed that most servicemen had no intention to remain in Texas and were therefore not bonafide residents; in *Frontiero* it was assumed that most wives are economically dependent on their husbands, while most husbands are not dependent on their wives for over half their support. In this action, however, Appellant justifies an exclusion from benefits often desperately needed for economic survival on the basis of a sex stereotype admittedly inapplicable to over half the class thereby excluded. The classification not only denies these women equal protection of the laws by inquiring into their labor force status when men are not similarly questioned (*Cf.*

Frontiero v. Richardson, supra) but also denies women within the class due process of law by operation of a demonstrably arbitrary conclusive presumption. The disqualification from benefits of all women disabled by pregnancy or childbirth can in no way be justified by a different pattern of labor force participation true of only half the women involved.

C. The administrative convenience of excluding all claims on the assumption that women and their physicians will otherwise attempt to defraud the program cannot justify the exclusion from coverage of all disabilities caused by pregnancy and childbirth.

Appellant *admits* that "it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth," (Appellant's Br. at 20) but contends that women, with the cooperation of their doctors, would make claims for the longer period. The apparent justification for the total exclusion from benefits of actual birth-related disabilities is thus reduced to one of preventing fraud by classification rather than by the individualized treatment which is accorded each and every other disabled person in the California program.

It may well be that there will be some confusion among doctors, as well as employers and employees, over the distinction made in the California program between medical disability of the woman and the sociological and psychological decision to stay at home for some period of time for the welfare of a newborn child. If such confusion exists, Appellant can issue

guidelines to physicians regarding eligibility for disability insurance benefits. Appellant may not lightly presume that the medical profession will nevertheless ignore such guidelines. As Mr. Justice Burger remarked recently:

> The vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health.
>
> *Roe v. Wade,* 410 U.S. 113, 208 (1973) (concurring opinion).

There is no reason to believe that physicians would not comply with any guidelines that Appellant might promulgate regarding permissible bases for finding disability in this context.

Even assuming that continuing problems would be presented regarding the period for which a woman is truly disabled from performing her customary or regular work, Appellant could not constitutionally exclude this entire class of claimants simply in order to avoid individualized consideration of the extent of disability involved. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Board of Education v. LaFleur* ___ U.S. ___, 42 U.S.L.W. at 4191 (1974). As this Court stated in *Reed v. Reed,* 404 U.S. 71 (1971), to "give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection

Clause of the Fourteenth Amendment." *Id.* at 76. *See also, Carrington v. Rash,* 380 U.S. 89, 96 (1965). It cannot even be argued here, as the Court noted it might be in *Stanley v. Illinois,* 405 U.S. 645 (1972), or in *Carrington,* that the great majority of those excluded by the statute would be excluded after individual consideration as well. For the State readily admits that any individual assessment would show that the overwhelming majority of women *are* disabled by injuries suffered in childbirth for some period of time. The *only* question is whether that disability endures for two weeks, two months, or two years. As this Court said in *Stanley,* "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure . . . explicitly disdains present realities . . . it needlessly risks running roughshod over the important interests of [the individual]." 405 U.S. 645, 656-57. Here, as in *Stanley,* the presumption is contrary to fact. Unlike *Stanley* or *Vlandis v. Kline,* 412 U.S. 441 (1973), the presumption is not only contrary to fact some of the time, it is contrary to fact *all* of the time.

Nor can Appellant justify its approach by its legitimate interest in reducing fraudulent claims. Even if it were proven that women would purposely make false claims, and that doctors would intentionally disregard Appellant's guidelines, a very dubious possibility, the arbitrary exclusion of *all* claims, *all* of which have *some* validity is, to say the least, overbroad. *U.S. Dep't of Agriculture v. Moreno,* 413 U.S. 528, 535-36 (1973); *Vlandis v. Kline,* 412 U.S. 441 (1973); *U.S. Dep't of*

Agriculture v. Murry, 413 U.S. 508 (1973); *Cf. Cleveland Board of Education v. LaFleur* ___ U.S. ___, 42 U.S.L.W. 4186, 4190 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1961).

D. The cost of extending coverage to disabilities caused by pregnancy and childbirth has been grossly exaggerated by appellant, but in any event cannot justify discrimination on the basis of sex.

Appellant contends that women are more costly to insure than men even when birth-caused disabilities are excluded from coverage, and that this alleged cost differential justifies continued exclusion from coverage of such disabilities. Appellant further claims that the cost of extending coverage would be exorbitant, and that the incremental cost of extending equal treatment to these women can justify continued discrimination against them. These contentions are erroneous both in fact and in law.

1. The present claims experience of women in the California program is statutorily and constitutionally irrelevant, but in any event does not support appellant's claim that women are more costly to insure.

California's use of the pooled fund concept of insurance renders irrelevant for every purpose, the possible differential cost of insuring particularly high risk groups of employees or costly disabilities.[100] California has never attempted to limit benefits or raise the contribution rate for a group which is known to be relatively more costly to insure. For example, the

[100]See pp. 9-13, *supra*.

Legislature has known for almost a decade[101] that the unemployed disabled and low paid workers have longer and more frequent periods of disability, yet no change in eligibility, benefit rates, or contribution rates has ever been made for these groups. Actuarial considerations are not used. Therefore, even if women were more costly to insure as a class than men, the fact would be irrelevant to coverage under the California program and could not justify the exclusion from coverage of disabilities caused by pregnancy and childbirth.

Nor would the Equal Protection Clause be complied with if Appellant could show that women are actuarially more expensive to insure than men. The lesson of *Reed, Frontiero,* and *LaFleur* is that courts will no longer tolerate sex-averaging as a justification for discriminating against individuals or subgroups on the basis of sex. The Equal Protection Clause requires not that treatment be "equal" in the sense of some monetary ratio of costs and benefits, *cf. San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), but rather that classifications be based upon a difference having some fair and substantial relation to the objective of the legislation. As Appellees have previously set forth in detail, the California program, far from attempting to equalize cost/benefit ratios among various classes of employees, statutorily ensures that lower paid workers will get proportionally

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[101]See JOINT COMMITTEE ON UNEMPLOYMENT COMPENSATION DISABILITY INSURANCE, *supra* note 7, at 16-19, 37-41.

more in benefits than they contribute to the fund. See p. 19, *supra.*

In any event, while a higher cost for insuring women could, therefore, not justify the discrimination against individual women claimants involved here, the plain fact is that sex is not a significant determinant of program costs. Studies conducted by Appellant's own department reveal that sex has almost nothing to do with duration of disabilities or with average disability days lost each year.[102] Income and age are far better explanatory variables than sex in predicting disability experience.[103] As the Assembly's Joint Committee concluded:

> The sex of the claimant is a factor of very minor, if any, importance in influencing average duration when other factors are held constant. . . .[104]

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[102]Dept of Employment Report 1200 No. 12, reprinted in *Id.* at 121-130, discussed at 51-52. The report yields the following data for 1964:

	Average Number of Weeks Per Claim by Age				
	Total	Under 45	45-54	55-64	65 and over
Males earning less than $4000	8.1	6.5	8.6	10.9	13.0
Females, under $4000/yr	8.0	7.1	8.6	9.7	12.8
Males over $4000/yr	6.5	5.2	6.7	8.3	11.0
Females, over $4000/yr	6.9	6.2	7.0	8.2	11.9

[103]*See generally,* HEW, Time Lost From Work Among the Currently Employed Population, United States—1968 (Vital and Health Stats. Series 10, No. 71), Table B, at 5-7. Average days of work lost due to disability was higher for women on the whole in 1968, but lower in 1963-64, 1964-65, and 1965-66. *Id.*, at 4. Work loss days varied directly with income, education, and age. For each educational group, moreover, persons with lower income had more work loss.

[104]Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 43.

Even when income and age are not held constant, the most recent experience of Appellant's Department is that women have a lower duration average, both for basic benefits and hospitalization than do men.[105] In short, Appellant's contention that women cost more to insure than men is wrong.

Appellant contends that the fact that women as a class contribute 28% of program funds and receive 38% of program benefits demonstrates that they are more costly to insure, adding that California has a right to tie benefits received to contributions made.[106] Women receive more than they contribute, however, not because they have more costly disabilities, but rather because (1) average wages for women are only 60% of those for men, and (2) California's statutory scheme ensures that lower paid workers will get paid more than they contribute for the same disability experience. Women constitute approximately 40% of the California labor force.[107] Their average wages are only 60% of those of men.[108] Simple arithmetic yields the expected result that any group with these characteristics will contribute only about 28% of the funds

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[105]The average duration of paid claims in 1971 was 8.2 weeks for men and 8.1 weeks for women. Average hospitalization was 8.1 days for men and 7.0 days for women. Women have a slightly greater frequency rate, however. H.R.D., California Disability Insurance Terminated Claims: 1971 (Report 1031A, May 22, 1972), Tables 2, 6.

[106]Appellant's Br. at 26.

[107]Milliman and Robertson, Inc., *supra*, note 6, Table 3; *see also* CALIF. COMM'N. ON THE STATUS OF WOMEN, REPORT: CALIFORNIA WOMEN 11 (1974).

[108]See WOMEN'S BUREAU, DEP'T OF LABOR, ECONOMIC REPORT OF THE PRESIDENT 106 (1973).

of the California program.[109] Appellant himself has estimated that women receive approximately 85% of the average weekly benefit amount that men receive.[110] Assuming this figure to be accurate, the multiplier built into the California program for all persons (regardless of sex) earning what women earn is approximately a ratio of 85 to 60, or 1.417.[111] Given an *equal* disability experience, therefore, one would expect that women, contributing 28% of program funds, would withdraw 39.76% of the benefits. In fact, women receive 38.3% of all benefit payments.[112] This disparity in benefits as compared to contributions results solely from California's decision to structure its benefit scale so as to pay proportionally more to lower paid workers, *not* from the duration or frequencies of disabilities among women. (CAL. UNEMP. INS. CODE §2655.)[113]

The fact that women receive more in benefits than they contribute is not only irrelevant to the program and its compliance with the equal protection clause, as well as to the cost of insuring women as a class, but also reflects the sex discrimination which contin-

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[109]If men earn x wages and constitute 60% of the work force, and women earn $.6x$ wages and constitute 40% of the work force, total contributions in a flat-rate contribution system will be $.6(x)$ plus $.4(.6x)$, or $.84x$. Women contribute $.24x$, or about 28% of the total.

[110]See Appellees' Addendum to this Brief, Statistician's Notes.

[111]This figure assumes that the benefit to wage ratio is the same as the benefit to contribution ratio. The figure may be slightly exaggerated because of the limit on taxable wages in the California program.

[112]HRD, Calif. Disability Insurance Terminated, Claims 1971, *supra* note 105, at Table 2.

[113]Women still receive slightly lesser benefits than their percentage of the labor force might lead one to expect.

ues to pervade the job market, ensuring that women will continue to earn less than men in comparable jobs and will be excluded from many better paying occupations. Appellant cannot justify the exclusion challenged in this action upon such a basis.

2. Appellant grossly exaggerates the cost of extending coverage to disabilities caused by pregnancy and parturition.

The crux of Appellant's argument is that it costs too much to extend the equal protection of California's disability program to women. As Appellees discuss in the next part of this Brief, the spectre of increased costs has never been an acceptable justification for arbitrary or invidious classification. Nor may it be so here. Appellant's attempt to impress the Court with a large cost estimate nevertheless lacks candor, for Appellant's own statistics and others readily available to him belie Appellant's contentions.[114]

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[114]In the *Armendariz* Appellees' Points and Authorities in Support of Petition for Writ of Mandate, included in the record herein, Appellees included as exhibits two estimates made by Appellant of the cost of extending coverage for a limited period. In their Interrogatories, Appellees asked Appellant to state the source of his estimates in detail. After providing certain data, Appellant noted that his estimate of the cost of extending coverage on the same basis as provided for other disabilities was contained in a separate report of Appellant's department, numbered 1972 T#3, and offered to provide Appellees with copies of said document. Answer to Interrogatory No. 15, at 13. Appellant subsequently provided Appellees with this report and the department statistician's longhand notes regarding the basis for his estimates. Through inadvertence, neither Appellant nor Appellees filed a copy of this report and its accompanying notes with the District Court. As a result it was never made part of the record in this action. Because of the importance of this report as a basis for Appellant's current estimate, Appellees now include a copy of this report and the statistician's notes as an Appellees' Addendum to this Brief.

Appellant's estimate of a cost of $120.2 million[115] is based on a number of assumptions and consists of a number of different components. The cost of covering complications of pregnancy, which was relevant before the District Court, alone constituted almost $12,000,000 of this total.[116] The cost of covering live births, which represents most of the remaining estimate of $108 million,[117] is based on two essential statistics: the birth rate and the average duration of disability.[118]

In his Answers to Plaintiffs' Interrogatories, which are part of the record herein, Appellant states that his original estimate that 200,000 women would be affected per year was based on a birth rate of 18.3 per thousand in 1970, and that his present estimate

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[115]Appellant now claims that the $120.2 million figure was based on an estimated duration of 13 weeks, and that his revised estimate of 15 weeks justifies a figure of $131 million. As the statistician's notes make clear, however, a 15 week period has always been assumed, and formed the basis for the $120.2 million figure. See Appellees' Addendum to this Brief, Statistician's Notes, at 6. See also, Answer to Interrogatory 14 (part 4).

[116]An additional 6.0 hospital days and 7.0 weeks of disability was estimated for complications in 22,000 births, yielding costs of $1,584,000 for hospital benefits and $9,695,840 for weekly benefits at $62.96 per week. See Appellees' Addendum to this Brief. Prior estimates were $14.9 million for complications. Answer to Interrogatory 11.

[117]Costs of $20,013 were estimated for coverage of maternal deaths, $292,360 for disabilities resulting from fetal deaths, and $2,003,639 for disabilities resulting from abortions. See Appellees' Addendum to this Brief. On the validity of this latter figure, see note 128, *infra*.

[118]These cost estimates also depend on the duration of hospitalization, the average weekly benefit, and the percentage of all women covered by the program. Appellees have assumed these estimates to be correct.

of 140,000[119] women is based on a 1971 birth rate of 17.2 per thousand.[120] The 1972 birth rate in California, however, was only 14.9 per thousand, with the 1973 rate estimated at an even lower 14.5 per thousand.[121] This precipitous drop in the birth rate has taken place on a national level,[122] and has led to concern that we have plunged beneath the birth rate needed even for zero population growth.[123] Appellees have no way to predict how many covered childbirths will take place in California in 1974, but it seems fairly safe to assume that far fewer than Appellant's estimate of 111,000 covered births will take place. An estimate of 100,000 is generous.[124]

Appellant has consistently based his cost estimates upon a fifteen week average duration of disability.

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[119]See Appellees' Addendum to this Brief, Report 1972 T #3; Answer to Interrogatory 11, at 9.

[120]Answer to Interrogatory 11, at 9. The actual 1971 birth rate was 17.3 per thousand population for the United States, but only 16.3 for California. See notes 121 and 122, *infra*.

[121]Dept. of Health, Vital Statistic Section, State of California. The 1972 rate represents a sharp drop from 16.3 in 1971, 17.9 in 1966, and 23.3 in 1961.

[122]The birth rate for the United States was 23.3 in 1961, 18.4 in 1966, 17.3 in 1971, and 15.6 in 1972. National Center for Health Statistics, HEW, *Monthly Vital Statistics Report; see also* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES FOR 1972.

[123]*Caution on Zero Growth: Birth Rate at Record Low*, S.F. Chronicle, March 3, 1973, at 4, col. 1, quoting Census Bureau reports. According to the Chronicle article, the fertility rate fell in 1972 to 2.03 children per family, significantly below the replacement level of 2.1 children.

[124]The number of births dropped 9% nationally from 1971 to 1972. *Id.* Since Appellant's estimate of 111,000 covered births (see Appellees' Addendum to this Brief) is based on a 1971 estimate of 17.2 and since the birth rate dropped in California to 14.5, as compared to a drop of 17.3 to 15.6 nationally, it is safe to assume at least a 10% drop in births in California.

He bases this estimate upon a small sample of unprocessed claims received immediately after newspaper coverage of the District Court's decision in this action and on varying estimates of disability given by doctors responding to a "survey" conducted by Appellant's medical director. (See Appendix to Brief for Appellant.) Appellant's sample, however, is certainly not random.[125] Moreover, even if the sample were representative of *initial* claims, it would in no way be representative of *processed* claims, which depend in part on Appellant's examination of the validity of the period claimed. If some ambiguity persists in the minds of obstetricians—most of whom have had little exposure to the disability insurance program's standards—regarding the proper definition of medical disability under the California program, Appellant can surely issue guidelines illustrating what are valid and invalid considerations in determining the period of compensable disability.

The survey conducted by Appellant's medical director, far from giving credence to Appellant's argument, directly supports that of Appellees. Of the three groups of doctors whose views were solicited, the professors of obstetrics and gynecology on the average predicted a total prepartum and postpartum disability period of 7 weeks. Doctors certified by the American Board of Obstetrics and Gynecology reported on the average a prediction of 8 weeks, while

[125]The sample is based upon persons already disabled by pregnancy at the time of newspaper coverage of the District Court's decision. Women with a longer duration of disability are therefore likely to be overrepresented in the sample.

Appellant's own independent medical examiners, who actually assess the validity of claims, on the average, predicted a period of 6⅔ weeks.[126]

The doctors surveyed by Appellant thus, on the average, concur with the recent Policy Statement of the American College of Obstetricians and Gynecologists, quoted in full at p. 59, *supra,* which sets the predicted period of disability at six to eight weeks. Coincidentally, the average duration of all claims paid in California is slightly longer—8.2 weeks—than this period.[127]

Assuming, as Appellant does, average weekly benefits of $62.96 for women, 100,000 covered births, and a seven week duration of disability, Appellant's estimate of $108 million for basic benefits is reduced to $44,072,000. Assuming Appellant's estimate of 4.0 hospital days to be correct, another $4.8 million would be expended for hospitalization benefits, for total costs of $48.9 million.[128] These costs represent a 12%

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[126]See Appendix to Brief for Appellant, *passim*. The averages presented were constructed by averaging predictions within each category. A prediction of variable duration, *e.g.* 4-6 weeks, was treated as an average of its extremes, *e.g.* 5 weeks.

[127]H.R.D., California Disability Insurance Terminated Claims: 1971 (Report 1031A, May 22, 1972), Table 6.

[128]This figure does not include Appellant's estimate of $2 million for disabilities caused by abortions. Many women are not hospitalized for abortions, and disability rarely extends over three days in the absence of complications (which may be compensable under Section 2626.2). Appellant's estimate of one week's duration was based in part on the questionable assumption of mental anguish on the part of all women having abortions. See Appellees' Addendum to this Brief, Statistician's Notes, at 7-8. The cost of covering disabilities caused by abortions, when the disability is not the result of a compensable "involuntary or abnormal" complication, would be negligible. The $108 million estimate also included small amounts for maternal and fetal deaths. See note 117, *supra*.

increase over present expenditures, and could be funded by increasing the taxable income base or by increasing the contribution rate to 1.12%, thereby increasing total maximum annual individual contributions from $90 to only $100.80.[129]

This modest cost increase, which is comparable to the experience of private disability insurers,[130] cannot justify California's discrimination against women on account of their sex, by means of a classification that is irrational, arbitrary and based on sex stereotypes.

3. Incremental cost cannot justify discrimination on the basis of sex.

Appellant argues that the extra expense of providing coverage for disabilities caused by pregnancy and childbirth justifies excluding such disabilities from coverage. The cost of affording equal protection of the laws can never be considered an "extra" cost where the Constitution requires the inclusion of the excluded class within the State's program. The State may protect the fiscal integrity of its programs, but not by making invidious distinctions between classes

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[129]Even if Appellant's cost estimates were serendipitously accurate, the District Court pointed out that the entire cost increase could be met by requiring workers to contribute an additional amount of approximately 0.364% of their salary, thus increasing the maximum contribution by about $2.80 per month for those in the highest wage bracket. 359 F.Supp. at 798.

[130]Aetna Insurance and casualty Company provided the Citizens' Advisory Council on the Status of Women with an estimate that such coverage, with the same duration as exists in the California program (seven day waiting period, 26 week maximum coverage), would increase costs by 10%. Citizens' Advisory Council on the Status of Women, Information from Insurance Industry Relating to Coverage of Childbirth in Health Insurance and Temporary Disability Insurance, June 9, 1971, at 2.

of its citizens. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 633 (1969). Appellant has constitutionally acceptable alternatives for reducing overall program costs; the convenience of discriminating on the basis of sex cannot render the classification constitutional.

This Court has consistently rejected justification of otherwise irrational and arbitrary classifications on the basis of cost alone. In *Frontiero v. Richardson,* 411 U.S. 677 (1973), for example, this Court rejected the Government's argument that it would reduce administrative costs to presume conclusively that wives of male members of the military are financially dependent upon their husbands, while requiring that female members establish dependency in fact for purposes of obtaining certain housing and medical benefits. The euphemism of "administrative convenience" has long been used to cloak cost justifications in a mantle of discretion. *(cf. Schneider v. Town of Irvington,* 308 U.S. 147 (1939)), but this Court has not hestitated to reject such contentions even when the costs of compliance have been substantial. *Cf. Goldberg v. Kelly,* 397 U.S. 254 (1970); *Fuentes v. Shevin,* 407 U.S. 67, n.22 (1972); *Bell v. Burson,* 402 U.S. 535 (1971).

Moreover, cost justifications are often the "cloak" for other, nonfiscal considerations. Implicit in every incremental cost decision is a value judgment concerning the need for or merit of paying for the addtional service or benefit. Appellant does not assert that disability due to normal delivery is more costly than disabilities now covered by the disability insurance pro-

gram,[131] or that reasonable alternatives to exclusion are not available, yet he seeks to justify his exclusion on the ground that it costs "too much." Under these circumstances, the danger is that the unexamined value judgment which led to that conclusion is based upon stereotypes concerning women. Notions that women do not really need the benefits (See Appellant's Brief, p. 19, 25-26), that women are not serious members of the workforce,[132] and that women with children belong in the home, can be the unarticulated bases for an unwillingness to cover their disabilities.

Appellant relies on *Dandridge v. Williams,* 397 U.S. 471 (1970) and *Jefferson v. Hackney,* 406 U.S. 535 (1972) for the bald proposition that a far lower standard of rationality should be required of classifications in public assistance programs so long as those classifications promote fiscal economy. California's working people, who contribute a portion of their salary to finance the disability insurance program and who rely on *no* "public assistance" whatsoever for funding of the program, would be surprised to learn that Appellant regards the disability insurance program as a welfare program. This distortion notwithstanding, this Court has clearly "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or

[131]As the district court noted, "Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the cost of including other disabilities, because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered." 359 F.Supp. at 798.

[132]*See, e.g.,* note 34, *supra.*

as a 'privilege.'" *Graham v. Richardson,* 403 U.S. 365, 374 (1971). "Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money." *Palmer v. Thompson,* 403 U.S. 217 (1971). The requirement that classifications be based on rational differences bearing a fair and substantial relation to the object of the legislation has been applied no less vigorously in the field of public assistance programs than in other areas of the law. *See, e.g., U.S. Dep't of Agriculture v. Moreno,* 413 U.S. 528 (1973); *U.S. Dep't of Agriculture v. Murry,* 413 U.S. 508 (1973); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973); *Graham v. Richardson,* 403 U.S. 365 (1971); *Shapiro v. Thompson,* 394 U.S. 618 (1969). *Dandridge* and *Jefferson* do not stand for the proposition that any class of persons may be disadvantaged solely for the purpose of saving money, but rather require that the disadvantaged class be selected on rational grounds *apart* from cost justifications.

Dandridge and *Jefferson* are certainly inapplicable in the present context, where the classification created is itself subject to a more rigorous scrutiny than that applied in those cases. *Reed v. Reed,* 404 U.S. 71 (1971). This action involves discrimination on the basis of sex. Were classifications based on sex not subject to scrutiny in cases of monetary discrimination, *Reed* and *Frontiero* would not have been decided as they were.[133]

[133]Because California makes no distinctions on the basis of actuarial principles, no question is here presented as to whether a medical insurance plan might make such distinctions based on

If California wishes to limit the costs of its program, it may constitutionally do so by excluding or limiting all claims in excess of certain amounts, or by any other constitutional means, but it cannot exclude a whole class of disabled persons from coverage because of some stereotyped prediction that all pregnancy- and childbirth-caused disabilities will be of inordinate length or expense, nor because it is simply cheaper to exclude all such disabilities. Under the circumstances, the exclusion of such disabilities is as irrational and invidious as the exclusion of indigent children from the schools to reduce education expenditures. *Cf. Shapiro v. Thompson,* 394 U.S. 618, 633 (1969). There exists no distinguishing feature of these disabilities which would warrant singling them, and the women who have them, out from coverage for the purposes of economy. Preservation of

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part on classification by sex. Appellees simply note that, to the extent state action were involved, the classification would be subject to scrutiny to ascertain whether the classification used was statistically explanatory or whether non-sex-based classifications might better explain predicted morbidity rates. And *see* Note, *Sex Discrimination and Sex Base Mortality Tables,* 53 B.U.L. Rev. 624, 650-653 (1973) advocating "unisex" mortality tables. "Certain classifications, however statistically valid, are unacceptible from a policy point of view. Race is one of them; and this note argues that sex is another." *Id.* at 653. *See also Hearings before the Joint Economic Committee,* 93d Cong. 1st Sess. at 154 (1973) Statement of Hon. Herbert S. Denenberg, Commissioner of Insurance, State of Pennsylvania, in which he states: "There are some convenient bases of classification which the insurance industry does not now use. One is race. Although Blacks have a shorter life expectancy than whites, no classification based on race is used. Such a classification is considered to be unacceptible from a public policy standpoint. . . . With the changes in the economic, social and legal position of women, the once homogeneous classification of women has become less meaningful. It is clearly time to force the insurance industry to reevaluate all sex classifications of the insurance business." *Id.* at 154.

the fiscal integrity of government benefit programs is a commendable goal, even when the program is financed by the recipients themselves, but savings may not be achieved by invidious exclusions of persons guaranteed by the Constitution the equal protection of the laws.

CONCLUSION

For the reasons stated above, the decision of the Three-Judge District Court for the Northern District of California should be affirmed and the California Disability Insurance Program's exclusion of benefits for disabilities resulting from pregnancy and childbirth should be declared unconstitutional.

Respectfully submitted,

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(Appendix Follows)

State of California
Department of
Human Resources Development
1972 7 43

Employment Data and Research
September 26, 1972

CALIFORNIA DISABILITY INSURANCE PROGRAM

The Effect on Benefit Costs of Eliminating the Exclusion of Pregnancy Benefits in Section 2626

Estimated Full Effect in a Year Like Calendar Year 1972, Accrual Basis

(dollar amounts in millions)

Item	Present Statute	Including Pregnancy	Increase Amount	Increase Percent
Net worker contributions accrued	$339.0	$339.0	$	%
Net benefits incurred	330.1	450.3	120.2	36.4%
Basic	300.0	412.6	112.6	37.5%
Hospital	30.1	37.7	7.6	25.2%
Net benefits as a percentage of net contributions	97.4%	132.8%	---	---
Claimants receiving disability insurance benefits	552,000	698,000	---	26.4%

Based on the pregnancy benefit experience of disability insurance programs in New Jersey and Rhode Island, it is estimated that one-third of the California live births expected during 1972 will be to workers filing valid disability insurance claims. Based on data from insurance companies offering policies with pregnancy provisions to California residents, it is assumed that one out of every five live births to qualified claimants involve some form of prior complication of pregnancy. Another assumption is that therapeutic abortions performed under California laws would become compensable disabilities.

Of the estimated 146,000 women who would benefit from this proposal in a year like calendar year 1972, nearly 32,000 will have abortions and will receive an estimated $2.6 million of the $120.2 million in added disability insurance benefits.

The above estimate includes benefit costs for cases of maternal and fetal deaths, the number of such cases computed from rates published in the 1971 California Statistical Abstract. Abortion rates were supplied by the Epidemiology Unit of the Bureau of Maternal and Child Health in Berkeley.

DHR's claims examiners determine the reasonableness of the duration of any disability with the aid of tables of disability durations developed, and periodically reviewed, by the Medical Director. A tentative medical yardstick developed for pregnancy cases formed the basis of estimating the total number of weeks of pregnancy benefits to be compensated under this proposal.

Legislation enacted by the 1971 Legislature effective April 1, 1972, increased the maximum weekly benefit amount from $87 to $105 and provided financing for the increase by raising the taxable wage ceiling from $7,400 to $8,000, and effective January 1, 1973 to $8,500. At the present contribution rate of one percent of taxable wages earned during the year, no taxable wage ceiling increase could provide revenue sufficient to finance the increase in benefits this proposal provides.

The costs presented in this estimate would have been greater had the maximum weekly benefit amount of $105 been in effect for the entire 1972 calendar year.

Estimate of the effect of removing the following sentence from section 2612 of the IRC: In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

A. Our ability to make an accurate estimate depends on the accuracy of the three pieces of data for the estimate:

1. the average weekly base benefit amount the claimants added by the deletion of the sentence
2. the number of women who would file claims as a result of the deletion of the sentence
3. the average number of weeks basic benefits and the average number of days of hospital benefits the claimants would receive.

B. The three pieces of data are (presented above) by their supposed accuracy.

C. For a number of years the (average) weekly benefit amount women receive as a percent of the average weekly benefit amount for the entire program has remained fairly constant:

Year	Women's WBA as % of all WBA
1966	85.2%
1967	86.1
1968	88.0
1969	87.1
1970	86.0
1971	86.8

The average WBA for 1972 is estimated to be $71.87. (For Jan.-July of 1972 the actual figure — which we get to see this effect of the April increase in the maximum WBA — is $70.29)

The women's WBA in 1972 is estimated to be 87.6% of the over-all average WBA or:

$71.87 x 0.876 = $62.96.

We have decided to use this WBA even though women of child bearing age may have a lower average WBA than all women claimants. (Another view holds that the majority of births, abortions, and so on occur to younger women who have been in the labor force as long as have women careerists whose higher earnings obstruct the average weekly benefit amount.)

(and numbers)

D. The "types" of disabilities that would be compensable if the sentence in section 2626 of the UI Code were deleted are as follows:

Item	Prior complications of pregnancy	
	None	Some
Live births	88,800.	22,200.
Maternal deaths(a)	20.	5.
Fetal deaths(b)	1000.	250.
Neonatal deaths(c)	1130.	280.
Abortions(d)	25,759	6365
	116,709.	29,100.

(a) Maternal deaths are those due to complications of pregnancy, child birth, and the puerperium
(b) Fetal deaths are those of 20 or more weeks of gestation
(c) Neonatal deaths are those under 28 days
(d) Abortions performed under California laws; illegal abortions not considered

The (expected) number of female claimants to be assigned to each cell in the table above are computed thusly: (in 1972)

1. Live births: 111,000 (88,800 + 22,200). This number is about ½ of all live births expected to occur in 1972 to all California residents. That ratio is about the experience other State Disability programs with pregnancy provisions have had.

A previous estimate was computed by first dividing

the number of California live births to women of a particular age category by the number of California females in the same age category to obtain a birth rate. That birth rate was then applied to the known number of women covered by disability insurance to obtain the live births expected from working women. The resulting number - nearly 167,000 live births to women covered under the disability insurance laws - was considered to be unsatisfactory: it seemed unlikely that almost 1 out of every 2 live births in California occurred to women covered by disability insurance laws who had qualifying earnings.

The division of the 111,000 live births is based on tabulations of data from Blue Cross/Blue Shield. Based on 70,000 Northern California households, ⅓ of all live births resulted from women who had prior complications of pregnancy.

2. Maternal deaths. In 1970 there 22 maternal deaths per 100,000 live births in California (1971 California Statistical Abstract, p. 50, Table C-1) This means 24 maternal deaths. One-fifth of 24 is about 5.

3. Fetal deaths. There are about 11.3 fetal deaths per 1,000 live births.

$$111{,}000 \text{ live births} \times \frac{11.3}{1000} = 1254 \text{ fetal deaths}$$

(Same source as #2)

Using the ratio 1/5 to apportion the 1234 maternal deaths to women who suffered no prior complications of pregnancy, 250 who died.

4. Neonatal deaths. There are about 12.7 neonatal deaths per 1000 live births

$$111{,}000 \text{ live births} \times \frac{12.7}{1000} = 1410 \text{ neonatal deaths.}$$

Using the 1/5 ratio indicates 1130 neonatal deaths to women who suffered no prior complications of pregnancy and 280 who died. (Source: same as above.)

5. Abortions. The Epidemiology Unit of the Bureau of Maternal and Child Health says that the abortion rate (legal) in 1971 for California residents who gave birth ages 15-44 was 286.7 per 1000 live births

$$111{,}000 \text{ live births} \times \frac{286.7}{1000} = 31{,}824.$$

Three qualifications:

1) the abortion rate might be expected to increase in 1972 because the legal abortion program is still relatively new in Calif.

2) if economic conditions worsen in 1972 the abortion might be expected to increase.

3) the abortion rate might well be higher for working women than non-working women.

The split out of the 31,824 is accomplished by the 1/3 ratio.

E. The greatest unknown factor is the average number of basic weeks to be compensated and hospital days to be paid. (See note on p. 12)

1. Live births. Assign 4.0 hospital days to women with no prior complications, 10.0 to women with prior complications

$12 per day x 83,800 x 4.0 days = $4,262,400.
$12 per day x 22,200 x 10.0 days = $2,664,000.
TOTAL $6,926,400.

For live births where there were no prior complications of pregnancy, assume that, on the average, the physician will order his patient to stop working 11.0 weeks prior to expected termination of the pregnancy, and that the patient will continue drawing basic benefits for the 4.0 weeks post operative period for recuperation.

88,800 x $62.96 x 15 weeks = $83,862,720.

When prior complications are involved we assign 4.0 additional weeks. It is recognized that there will be "Sophia Loren" cases where the woman is ordered to bed for the full length of her pregnancy to avoid miscarriage. Actuaries we have consulted have.

with that the 7.0 additional weeks we excerpted in one estimate was about twice as high as it should be, although they too were unable to find specific data to support that position.

22,200 x 19 weeks x $62.96 = $26,556,528.

2. Abortions: This is the second largest cost component of the estimate, and is subject to a fairly accurate estimate.

The California Department of Public Health says 2/3 of all abortions are hospitalized one day, 1/5 are hospitalized 2 days, and the rest are, on the average, hospitalized 3 days. There is no need, therefore, to distinguish between abortions which are and which are not the result of prior complications.

2/3 = 10/15; 1/5 = 3/15; the rest = 2/15

$\frac{10}{15}(31,824 \times \$12 \text{ per day} \times 1 \text{ day}) + \frac{3}{15}(31,824 \times \$12 \text{ per day} \times 2 \text{ days}) +$

$\frac{2}{15}(31,824 \times \$12 \text{ per day} \times 3 \text{ days}) = \$560,102.$

Most abortions are performed with no physical post operative complications — but statistically a small number are. It is also possible to distinguish post operative cases which result in mental anguish — cases where the abortion is

filled with shame, remorse, guilt, and so on, and there must be cases where some abortees are more too stable mentally to begin with, so that the operation pushes them over the line. At any rate, we have decided therefore that all abortees should be assigned 1.0 weeks of basic benefits. ~~We [illegible] assigned them an average of [illegible]~~

31,824 x $62.96 x 1.0 weeks = $2,003,639. ✓✓

3. Maternal deaths. The 20 cases of maternal deaths (which by a rough definition are those women who die during birth) will be assigned the 11.0 weeks of basic benefits ~~appropriate normal pregnancies~~, but by definition no weeks for recuperation. They will receive 1 day of hospital benefits.

20 x 11.0 weeks x $62.96 = $13,851. ✓✓
20 x 1.0 days x $12 per day = $240.

The 5 cases of maternal deaths which resulted from some prior complications of pregnancy will receive the 11.0 weeks given for "normal" maternal deaths and an additional 4.0 weeks due to complications. Assume the full 20 days of hospitalization.

5 x 15 weeks x $62.96 = $4722. ✓✓
5 x 20 days x $12 per day = $1200.

4. Fetal deaths. By definition the fetus dies on or after the twentieth week of gestation. As a result of a fetal death, women who have had no prior complications of pregnancy might receive 1 day of hospitalization. Since 20 weeks is 5 months, a fetal death could occur in the ~~5th~~ 6th, 7th, 8th, or 9th month. Those that occurred in the ~~5th~~, 6th, or 7th month would receive no weeks of basic benefits, while those which occurred in the last two would receive some.

Therefore, we will assign an average duration of 2.0 weeks for women to which fetal deaths have occurred and who had no prior complications

4by 1000X 1 day x $12 per day = $12,000 - hospital benefits
1000X 2.0 weeks x $62.96 = $125,920 - basic benefits

Where the fetal deaths have occurred and the women have had some prior complications of pregnancy: we will assume 20 days of hospital benefits will be paid, and 6 weeks of basic benefits (2.0 weeks - the same as normal fetal cases - plus 4.0 weeks assigned for complications where normal live births resulted

8by 250 X 20 x $12 per day = $60,000.
250 x $62.96 x 6.0 week = $94,440.

5. Neonatal deaths. No cost component is estimated. Cases of neonatal death appear, by definition, in live birth statistics

F Two offsetting factors are considered before the cost components are ~~summed~~.

1. The sum of ~~the~~ basic & hospital benefits should be reduced by 5%. Claimants are limited in the (to the) duration of benefits because of 26 weeks times the weekly benefit amount or one-half base period wages. Experience indicates, therefore, a 5% reduction due to the rule.

2. On the other hand, benefits = basic & hospital - perhaps should be increased because of the degree of "anti selection." Some women might consciously arrange the pattern of their employment and pregnancy so as to capitalize on the disability insurance "bonanza." The degree of "anti selection" is anyone's guess, but reasonably it might increase as the benefit scale is increased.

For convenience we have assumed the two factors are offsetting.

State of California
Department of
Human Resources Development
1972 X #5

Employment Data and Research
June 30, 1972

CALIFORNIA DISABILITY INSURANCE PROGRAM

The Cost of SB 419 As Amended June 29, 1972, To Provide That the Disability Insurance Program Shall Pay 10 Weeks of Benefits For Normal Pregnancies and a Maximum of 26 Weeks for Injury or Illness Caused by Pregnancy, If the Claimant was Employed at Least 10 Months Prior to the Termination of Her Pregnancy.

Estimated Full Effect of SB 419 As Amended In a Year Like Calendar Year 1972
Accrual Basis

(dollar amounts in millions)

Item	Present Statute	Under SB 419 As Amended	Increase Amount	Increase Percent
Net worker contributions accrued	$339.0	$339.0	$	$
Net benefits incurred	$330.1	$410.6	$80.5	24.4%
Basic	300.0	374.0	74.0	24.7%
Hospital	30.1	36.6	6.5	21.6%
Net benefits as a percentage of net contributions	97.4%	121.1%	--	--

This estimate is derived from data obtained from the U.S. Public Health Service, the Bureau of the Census and the California Department of Finance. It takes into account the experience of disability programs in Rhode Island and New Jersey with pregnancy benefits.

It is assumed that almost all claimants entitled to the 10 weeks of benefits would claim the full amount. That assumption is based on the experience of such programs in other states and by independently conducted studies of the California Disability Insurance Program. (See Sinai, Nathan, Dr., Bureau of Public Health Economics, Research Series No. 5, For the Disabled Sick, Disability Compensation.)

The above estimate assumes that one-third of the pregnancies resulting in live births would be compensated. If women would be able to arrange the pattern of their employment and pregnancy to gain benefits the potential cost of the proposal is understated.

Approximately 160,000 female claimants would benefit from this proposal in a year like calendar year 1972.

The amended bill includes a schedule of rates to escalate the employee contribution above the present one percent rate to maintain a relationship between the amount of the fund reserve and benefits paid each year. If the proposal is enacted, the contribution rate would be 1.2 percent for most years with a few years at either 1.1 or 1.3 percent.

W 1972 NBS

1. 111,000 live births in 1972 to women covered by O.I. who have qualifying earnings

fetal deaths = 11.3 per thousand live births =
111 x 11.3 = 1,254 ·

maternal deaths = 2.2 per 10,000 live births =
11.1 x 2.2 = 24 ·

abortions = 47,000 · why changed

prior complications = ⅕ x 111,000 = 22,200

. HOSPITAL BENEFITS

A. Live births ?
4.0 days x $12 day x 111,000 = $5,328,000

B. Abortions = $827,200 (see unpublished 126,000 estimate)

C. Prior complications

22,200 x 1 day x $12 = $266,400 ·

. Maternal deaths

24 x 1 day x $12 = $288 ·

E. Fetal deaths

4.0 days x $12 x 1,254 = $60,192.

F. Summarizing the increase in 1972 hospital benefits attributable to pregnancy provisions

Item	Amount
Live births	$ 5,328,000.
Abortions	827,200.
Prior Complcats	266,400.
Maternal deaths	288.
Fetal deaths	60,192.
TOTAL	$ 6,482,080.

3. Basic payments in 1972 for pregnancy procedures

A. Woman's WBA in '72 = $62.96

B. Live births

111,000 x 9.5 weeks x $62.96 = $66,391,320.

C. Abortions = $2,959,120.

D. Prior complications

22,200 x 6.0 weeks x $62.96 = $8,386,272.

E. Fetal deaths

1,254 x 2 weeks x $62.96 = $157,904.

F. No calculation for maternal deaths

Summary

Item	Hospital	Basic	Total
live births	$ 5,328,000.	$ 66,391,320.	
Abortions	827,200.	2,959,120.	
Fetal Complications	266,400.	8,384,272.	
Maternal deaths	288.	-0-	
Infant deaths	60,192.	157,904.	
TOTAL	$ 6,482,080.	77,894,616.	

Because the persons who would benefit from the pregnancy provisions would fall under the one-half base period provision, a 5% reduction in basic benefits is required.

$ 77,894,616 x 0.95 = $ 73,999,885.

Hospital	$ 6,482,080.	$ 6.5 M.
Basic	$ 73,999,885.	74.0 M.
TOTAL	$ 80,481,965.	$ 80.5 M.